182 (1)

Supreme Court, U.S.
FILED

No. 10-101075 FEB 28 2011

OFFICE OF THE CLERK

In The

# Supreme Court of the United States

WESLEY TRENT SNIPES,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

SAMUEL J. BUFFONE
BRIAN P. KELLY
BUCKLEYSANDLER LLP
1250 24th St., NW, Suite 700
Washington, DC 20037
(202) 349-7940
SBuffone@BuckleySandler.com

PETER GOLDBERGER
*Counsel of Record*
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net

*Of Counsel:*
DANIEL R. MEACHUM
DANIEL R. MEACHUM & ASSOC., LLC
Centennial Tower, Suite 2400
101 Marietta St., NW
Atlanta, GA 30303
(770) 988-9600
dmeachum@dmeachumlaw.com

February 2011

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTIONS PRESENTED

1. Is an accused person deprived of the right under Article III and the Sixth Amendment to be tried only by a jury of the community where venue is proper, when factual questions determinative of whether venue has been correctly laid are determined solely by a jury selected in the place challenged by the defendant as incorrect?

2. Where venue is a contested factual issue in a criminal trial, does the government bear a burden of proof beyond a reasonable doubt or only by a preponderance of the evidence?

## LIST OF PARTIES

The caption of the case in this Court contains the names of all parties (petitioner Snipes and respondent United States). Mr. Snipes had two co-defendants at trial, Eddie Ray Kahn and Douglas Rosile. Kahn did not appeal; Rosile dismissed his appeal.

TABLE OF CONTENTS


| | Page |
|---|---|
| QUESTIONS PRESENTED | i |
| LIST OF PARTIES | ii |
| INDEX TO APPENDICES | iv |
| TABLE OF AUTHORITIES | v |
| PETITION | 1 |
| OPINIONS BELOW | 1 |
| JURISDICTION | 1 |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| a. Procedural History | 3 |
| b. Statement of Facts | 5 |
| c. Statement of Lower Court Jurisdiction | 10 |
| REASONS FOR GRANTING THE WRIT | 11 |
| 1. Assigning the exclusive determination of contested venue to the jury in the challenged locale fails to protect a defendant's fundamental rights under Article III and the Sixth Amendment | 11 |

TABLE OF CONTENTS – Continued

Page

2. This case presents an additional Fifth and Sixth Amendment issue of national importance: whether venue, a fact necessary to the conviction in a criminal case, can be established by a mere preponderance of the evidence ..... 27

CONCLUSION ..... 36

INDEX TO APPENDICES

A. Opinion of the United States Court of Appeals for the Eleventh Circuit, published at 611 F.3d 855 (2010) ..... App. 1

B. Order on Motions (M.D.Fla., Sept. 5, 2007) ..... App. 35

C. Order on Motions (M.D.Fla., Dec. 24, 2007) ..... App. 60

D. Opinion of the United States Court of Appeals for the Eleventh Circuit, published at 512 F.3d 1301 (2008) ..... App. 75

E. Order denying rehearing (11th Cir., Sept. 29, 2010) ..... App. 78

F. Constitutional Provisions, Statutes, and Rules Involved ..... App. 80

# TABLE OF AUTHORITIES

Page

CASES

*Black v. United States*, 561 U.S. —, 130 S.Ct. 2963 (2010) ..... 34

*Blair v. United States*, 32 F.2d 130 (8th Cir. 1929) ..... 30, 31

*Bowles v. Russell*, 551 U.S. 205 (2007) ..... 22

*Burton v. United States*, 202 U.S. 344 (1906) ..... 15

*Busic v. United States*, 446 U.S. 398 (1980) ..... 22

*Costello v. United States*, 350 U.S. 359 (1956) ..... 23, 24, 25

*County Court of Ulster County v. Allen*, 442 U.S. 140 (1979) ..... 28

*Cunningham v. California*, 549 U.S. 270 (2007) ..... 28

*Dean v. United States*, 246 F.2d 335 (8th Cir. 1957) ..... 29

*Duncan v. Louisiana*, 391 U.S. 145 (1968) ..... 15

*Eberhart v. United States*, 546 U.S. 12 (2005) ..... 22

*Ex parte Gon-shay-ee*, 130 U.S. 343 (1889) ..... 24

*Harris v. United States*, 536 U.S. 545 (2002) ..... 28

*Hyde v. Shine*, 199 U.S. 62 (1905) ..... 17

*In re Groban*, 352 U.S. 330 (1957) ..... 25

*In re Winship*, 397 U.S. 358 (1970) ..... 27, 31, 32

*J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124 (2001) ..... 21

*Jackson v. Denno*, 378 U.S. 368 (1964) ..... 19

TABLE OF AUTHORITIES – Continued

Page

*Jones v. United States*, 526 U.S. 227 (1999) .....28

*Lego v. Twomey*, 404 U.S. 477 (1972) .....19

*MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007) .....34

*Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989) .....24

*Patterson v. New York*, 432 U.S. 197 (1977) .....28

*Price v. Henkel*, 216 U.S. 488 (1910) .....23

*Ring v. Arizona*, 536 U.S. 584 (2002) .....27

*Schmuck v. United States*, 489 U.S. 705 (1989) .....33

*Serfass v. United States*, 420 U.S. 377 (1975) .....23

*Simmons v. United States*, 390 U.S. 377 (1968) .....25

*Skilling v. United States*, 561 U.S. —, 130 S.Ct. 2896 (2010) .....34

*Sullivan v. Louisiana*, 508 U.S. 275 (1993) .....28, 35

*Tinsley v. Treat*, 205 U.S. 20 (1907) .....22

*Travis v. United States*, 364 U.S. 631 (1961) .....13, 32

*U.S. ex rel. Hughes v. Gault*, 271 U.S. 142 (1926) .....23

*United States v. Anderson*, 328 U.S. 699 (1946) .....13

*United States v. Black Cloud*, 590 F.2d 270 (8th Cir. 1979) .....29

*United States v. Booker*, 543 U.S. 220 (2005) .....27

*United States v. Broce*, 488 U.S. 563 (1989) .....19

TABLE OF AUTHORITIES – Continued

Page

*United States v. Cabrales*, 524 U.S. 1 (1998) ..... 16

*United States v. Calhoun*, 566 F.2d 969 (5th Cir. 1978) ..... 14

*United States v. Charlton*, 372 F.2d 663 (6th Cir. 1967) ..... 29

*United States v. Cores*, 356 U.S. 405 (1958) ..... 18

*United States v. Gaudin*, 515 U.S. 506 (1995) ..... 27, 31, 34

*United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) ..... 26

*United States v. Griley*, 814 F.2d 967 (4th Cir. 1987) ..... 29

*United States v. Hamilton*, 587 F.3d 1199 (10th Cir. 2009) ..... 29

*United States v. Humphreys*, 982 F.2d 254 (8th Cir. 1992) ..... 22

*United States v. Johnson*, 323 U.S. 273 (1944) ..... 31, 32

*United States v. Knox*, 540 F.3d 708 (7th Cir. 2008) ..... 29

*United States v. Lenoue*, 137 F.3d 656 (1st Cir. 1998) ..... 29

*United States v. Lombardo*, 241 U.S. 73 (1916) ..... 13

*United States v. Marcus*, 560 U.S. —, 130 S.Ct. 2159 (2010) ..... 34, 35

*United States v. North*, 910 F.2d 843 (D.C.Cir. 1990), *modified in other respects on rehearing*, 920 F.2d 940 (D.C.Cir. 1990) ..... 29

TABLE OF AUTHORITIES – Continued

Page

*United States v. Palma-Ruedas*, 121 F.3d 841 (3d Cir. 1997) *rev'd*, *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999) ..... 15

*United States v. Perez*, 280 F.3d 318 (3d Cir. 2002) ..... 29, 33

*United States v. Perrien*, 274 F.3d 936 (5th Cir. 2001) ..... 34

*United States v. Powell*, 498 F.2d 890 (9th Cir. 1974) ..... 29

*United States v. Robertson*, 514 U.S. 669 (1995) ..... 33

*United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999) ..... 15, 18, 26

*United States v. Rommy*, 506 F.3d 108 (2d Cir. 2007) ..... 29

*United States v. Stickle*, 454 F.3d 1265 (11th Cir. 2006) ..... 29

*United States v. Turkish*, 458 F.Supp. 874 (S.D.N.Y. 1978) ..... 22

*United States v. White*, 611 F.2d 531 (5th Cir. 1980) ..... 29

*United States v. Wood*, 299 U.S. 123 (1936) ..... 18

*Vasquez v. Hillery*, 474 U.S. 254 (1986) ..... 26

*Victor v. Nebraska*, 511 U.S. 1 (1994) ..... 28

*Williams v. Florida*, 399 U.S. 78 (1970) ..... 17

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const., art. III, § 2 ..... 11

U.S. Const., amend. V ..... 25, 27, 28, 33

U.S. Const., amend. VI ..... *passim*

Fla.Const., art. VII, § 6(a) ..... 10

STATUTES

18 U.S.C. § 924(c) ..... 26

18 U.S.C. § 1346 ..... 34

18 U.S.C. § 3231 ..... 10

18 U.S.C. § 3237 ..... 4, 14, 20, 21, 22

18 U.S.C. § 3501(a) ..... 19

26 U.S.C. § 6091(b) ..... 13

26 U.S.C. § 7203 ..... 2, 13, 20, 21

28 U.S.C. § 1254(1) ..... 2

28 U.S.C. § 1291 ..... 10

28 U.S.C. § 2072(b) ..... 21

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed.R.Crim.P. 12(b) (1944) ..... 21

Fed.R.Crim.P. 12(c) ..... 21

Fed.R.Crim.P. 18 ..... 14

Fed.R.Crim.P. 21 ..... 14

Fed.R.Crim.P. 21(b) ..... 4

Fed.R.Crim.P. 21(d) ..... 21

Fed.R.Crim.P. 45(b) ..... 22

Fed.R.Crim.P. 52(b) ..... 34

Sup. Ct. R. 12(e) ..... 22

Sup. Ct. R. 13.1 ..... 2

Sup. Ct. R. 13.3 ..... 2

Sup. Ct. R. 13.5 ..... 2

Sup. Ct. R. 14.1(f),(*i*) ..... 2

Sup. Ct. R. 29.2 ..... 2

Sup. Ct. R. 30.1 ..... 2

OTHER AUTHORITIES

ALI, MODEL PENAL CODE (OFFICIAL DRAFT) §§ 1.12(1), 1.13(9)(e) (1985) ..... 30

Akhil R. Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997) ..... 18

TABLE OF AUTHORITIES – Continued

Page

Annot., Necessity of proving venue or territorial jurisdiction of criminal offense beyond a reasonable doubt, 67 A.L.R.3d 988 (1975 Cum. Supp.) .....30

13 THE ENCYCLOPÆDIA OF EVIDENCE (Edgar W. Camp, ed. 1909).....30

4 Wayne R. LaFave, Jerrold H. Israel, Nancy J. King & Orin S. Kerr, CRIMINAL PROCEDURE (3d ed. 2007) .....30

Sand, Siffert, *et al.*, MODERN FEDERAL JURY INSTRUCTIONS § 19.01.....33

3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833).....13, 16

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Wesley Trent Snipes respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit affirming his conviction and sentence.

## OPINIONS BELOW

The Eleventh Circuit's Opinion (per Marcus, J., with Fay and Anderson, S.JJ.) is reported at 611 F.3d 855; Appx. 1. The United States District Court for the Middle District of Florida wrote two relevant pretrial memoranda, filed September 5, 2007, and December 24, 2007; *see* Appx. 35, 46-59, 60, 65-69, *available at* 2007 WL 2572198 and 2007 WL 5041892. The Eleventh Circuit's opinion dismissing an earlier, collateral order appeal is published at 512 F.3d 1301 (11th Cir. 2008) (per curiam); Appx. 75.

## JURISDICTION

The judgment of the Eleventh Circuit affirming petitioner's conviction and sentence was filed and entered on July 16, 2010. *See* Appx. 1. Petitioner timely sought rehearing, which was denied on September 29, 2010. Appx. 78. By orders dated December 22, 2010, and February 1, 2011, under No. 10A630,

Justice Thomas extended until February 26, 2011, a Saturday, the date for filing this petition. The petition is being filed by postmark on the first business day thereafter. Rules 13.1, 13.3, 13.5, 29.2, 30.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pursuant to Rule 14.1(f),(*i*)(v), the pertinent constitutional provisions, statutes, and rules of procedure are reproduced in the appendix.

## STATEMENT OF THE CASE

This petition arises out of the conviction of petitioner Wesley T. Snipes, after a nine-day jury trial (plus two days of deliberations), on three counts of an eight-count indictment in the Middle District of Florida. The counts of conviction charged willful failure to file federal income tax returns, a misdemeanor under 26 U.S.C. § 7203, for the years 1999, 2000 and 2001. The jury acquitted petitioner of two felonies and three additional misdemeanor tax charges. The district court imposed three consecutive maximum one-year terms of imprisonment.

### a. Procedural History

The trial evidence showed that during the earlier tax years in question petitioner Snipes resided with his family in New York City, but moved at the end of that time to a home in the northern New Jersey suburbs. He also maintained a residence near Los Angeles. The government alleged, the indictment charged, and the jury concluded, however, that his legal residence was in Florida. Out of this background, legal issues concerning venue on the failure-to-file counts pervaded the proceedings.

The district court denied a pretrial motion seeking a hearing on whether the failure-to-file counts had been brought in an improper venue, that is, before a constitutionally disqualified jury. Appx. 48-49. The motion sought dismissal, or in the alternative a transfer to the district where Snipes had made his legal residence during the time at issue. (It was undisputed that "legal residence" determines venue in a case of this kind.) The defense sought an evidentiary hearing to establish this fact, but the court denied the motion, deferring the issue for decision by the jury at trial. The district court denied reconsideration of its ruling, and also refused to allow the matter to be reopened when new counsel entered the case closer to the scheduled date for trial. Appx. 68-69. Petitioner's attempt to take a collateral order appeal on the question of whether venue was properly laid in Florida was dismissed by the Eleventh Circuit.

Appx. 75. Petitioner also sought a transfer of venue under either 18 U.S.C. § 3237(b) or under Fed.R.Crim.P. 21(b). All venue related relief was denied.

The defense at trial was focused principally on the issue of willfulness, but both parties also presented evidence bearing on venue, that is, on the question whether petitioner had resided in the Middle District of Florida during the years at issue. (This evidence is described in the Statement of Facts which follows.) Venue was also argued to the jury in closing as a defense on the failure-to-file counts. The jury found petitioner Snipes not guilty of conspiring with one Eddie Ray Kahn and others to defraud the United States and the Internal Revenue Service ("IRS") with respect to his tax obligations. He was likewise acquitted of knowingly submitting a false claim against the United States in the form of a 1040X (amended) return for the year 1997. Petitioner was also found not guilty of willfully failing to file personal income tax returns for the years 2002, 2003 and 2004. Petitioner was convicted, however, on Counts 3-5 of willful failure to file in 2000-2002 for tax years 1999-2001.

The district court (Wm. Terrell Hodges, Sr.U.S.D.J.) imposed three consecutive maximum one-year terms, for a total sentence of three years' imprisonment, to be followed by a one-year term of supervised release. As a special condition of supervision, in light of

petitioner's payment of a substantial amount of the delinquent taxes and of his ongoing participation in efforts to achieve a civil resolution with IRS, the sentencing court set a deadline of six months following his release from imprisonment for petitioner to attempt to settle his outstanding federal tax obligations. Judge Hodges also imposed the required special assessments, plus costs of prosecution.

Petitioner filed a timely appeal to the Eleventh Circuit. The government filed a cross-appeal, which became moot. Upon full briefing, and after having the matter under advisement for some seven months following oral argument, the panel issued an opinion on July 16, 2010. Appx. 1.

A petition for rehearing was denied. Appx. 78. This petition follows. After having been free on bail pending appeal, petitioner commenced service of his sentence on December 9, 2010.

### b. Statement of Facts

Wesley Snipes, a well-known movie actor, had been a client of Starr & Co., a New York firm whose attorneys, accountants and staff handled his taxes and investments. Starr & Co. also ran Snipes' personal finances (such as bill-paying), a service it provided for many show business celebrities. The

principal of Starr & Co., attorney Kenneth I. Starr, testified that he terminated Snipes as a client for most purposes on June 29, 2000.[1]

American Rights Litigators ("ARL") was run by co-defendant Kahn. ARL purported to provide tax assistance, although its main strategy was to engage in endless legalistic efforts to frustrate the tax assessment and collection processes. ARL employed attorneys and accountants, who completed forms and generated voluminous correspondence addressed to the IRS. Embracing the teachings and methods of ARL, petitioner filed no federal income tax return for 1999 or subsequent years. Petitioner received far more in gross income in each year at issue than the minimum amount which requires the filing of a return. Willfulness was hotly contested at trial, with the jury acquitting petitioner on most counts, including all involving fraud.

On the failure-to-file counts, the defense contended at trial that the government could not prove

---

[1] While petitioner's appeal was pending, Starr was indicted in the Southern District of New York (No. 10-CR-520), and sued by the SEC (No. 10-CV-4270), for defrauding his celebrity clients of more than $50 million, including stealing from them and forging their signatures. Starr later pleaded guilty to those charges and is awaiting sentencing within a week after the scheduled filing of this petition. The district court's denial of a motion for a new trial based on whether Starr perjured himself on those subjects (and others) at petitioner's trial, and whether the government knew or should have known of it, is currently pending appeal in the Eleventh Circuit.

that petitioner had his "permanent fixed place of abode" (which the parties agreed was the legal test for venue on these counts) within the Middle District of Florida on October 16, 2000 (the due date for his 1999 return), on April 16, 2001 (the due date for 2000), or on April 15, 2002 (the due date for 2001). Extensive evidence relevant to that question was adduced at trial by each side. In short, the defense brought forward documents in which petitioner claimed residence in New York or California, and witnesses testified that in fact he lived in California and New York (or, after 2002, in New Jersey) and not in Florida on or about the dates at issue. The government showed that petitioner spent at least some of his childhood in Florida, but there was no evidence that he continued to make his home there at any pertinent time and little that he intended to remain or return there.

While the government offered no evidence at trial that petitioner ever lived in Florida after leaving home to attend college, he did *own* a house in Windermere, a town within the Middle District of Florida, during the years in question.[2] The only witnesses with any

---

[2] Petitioner bought the house in 1992 in a corporate name. The house thereafter remained unoccupied for several years. No one ever saw any sign of him living there, and mail addressed to Mr. Snipes at that address during the pertinent time frame was returned by the Post Office as "undeliverable." The only person who was seen using the house was an older woman, and one witness testified the house was purchased "for his mother."

direct knowledge of the matter (called by the government) testified that petitioner had a residence near Los Angeles and another in New York City. A former assistant testified that she knew petitioner in 2003 lived with his new wife and their children in northern New Jersey, in a residence he bought in April 2002.[3] Prior to that, petitioner had a home in nearby New York City, the witness explained.[4] He "live[d] from time to time" in New Jersey, she said[5]; however, he "spent most of his time in the house in California, Marina Del Rey." When petitioner was not in New Jersey, at "other times he could have been at his home in California."

The total number of appearances in the thousands of pages of government exhibits of the Windermere and other Florida addresses was 929, while New York and

---

[3] The transaction was not in petitioner's name, records showed, so that fans would not learn where he lived. He began making payments toward the purchase of the New Jersey house in late 2001. Petitioner maintained extensive home offices at the New Jersey residence, the witness reported.

[4] When petitioner renewed his ARL membership in February 2002, he gave as his "street address" what appears to be an apartment address on West 48th Street in New York City (with the notation: "Please note change of address."). The IRS computer specialist recovered ARL files on Mr. Snipes, which reported that address repeatedly, as well as "310" (Los Angeles) and "212" (New York) telephone numbers.

[5] A 42-page letter to IRS, purporting to be from petitioner in June 2004, was notarized in Bergen County, New Jersey, as was other correspondence with IRS in that time period. A "filing statement" he submitted to IRS in 2005 gave a California address.

California addresses were reported 6275 times, almost seven times as often. Similarly, petitioner's credit card records showed him to be shopping in New York and California, not in Florida. The ratio of all Florida transactions to the total, 19/2162, is only 0.87%.

The government, on the other hand, relied on various documents dated at times between the early 1990s and 2006, in which petitioner identified the State of Florida or an address in Florida as his "residence." These documents included driver license renewals, a loan document, tax forms, movie contracts, and a federal civil complaint (filed in 2005, more than three years after the dates at issue) with Snipes' declaration that he was a "citizen and resident of Florida." Thus, for example, on March 3, 2003 (almost a year after the last date at issue here), petitioner signed a "Declaration of Allodium Freehold Land Title" stating that he was "a Article IV, Section 2 Citizen's of the Republic State of Florida. . . ." (sic). At about the same time, he claimed the house in Windermere to be exempt from "forced sale" as a "homestead" "under the provisions of the United States of America Homestead Act of 1862, Section 4."[6]

---

[6] There was no evidence that this so-called "homestead exemption" was ever recognized by any governmental authority. Moreover, the government never offered evidence that petitioner had claimed Florida's genuine "homestead objection" for the house in Windermere under the state Constitution (and implementing legislation) – an exemption from property tax on the first $25,000 of assessed valuation – which is available to the "legal or equitable" owner of real estate "who maintains thereon

(Continued on following page)

Having relied on the spurious nature of these very documents as evidence of criminal willfulness under the tax law, that is, of petitioner's *insincerity* in professing certain *beliefs*, the government thus invoked excerpts from the same documents as if they constituted admissions that petitioner was legally a "resident" of the Middle District of Florida. US CA11 Br. 14, 21. In the end, the court below found these sufficient, on a "plain error" standard of review, to meet a preponderance burden to prove petitioner's "permanent, fixed place of abode" between October 2000 and April 2002. Appx. 20 n.7.

### c. Statement of Lower Court Jurisdiction Under Rule 14.1(g)(ii).

The United States District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231; the indictment alleged federal criminal offenses. The court of appeals had jurisdiction under 28 U.S.C. § 1291.

---

the permanent residence of the owner, or [of] another legally or naturally dependent upon the owner. . . ." Fla.Const., art. VII, § 6(a).

## REASONS FOR GRANTING THE WRIT

### 1. Assigning the exclusive determination of contested venue to the jury in the challenged locale fails to protect a defendant's fundamental rights under Article III and the Sixth Amendment.

Section 2 of Article III of the Constitution of the United States guarantees the right to jury trial and promises that the trial will be held in the state where the alleged offense "shall have been committed." The Sixth Amendment reinforces that right by including in its specifically delineated provisions that the jury must be "of the state and district wherein the crime shall have been committed." Faced with petitioner's substantial claim that venue was improperly laid, as a matter of fact, for the counts charging him with failure to file income tax returns, the courts below ruled that the jury in the contested locale itself must decide the issue rather than allowing a pretrial hearing to determine venue. Relying on a jury drawn from a judicial district that petitioner challenged as an improper vicinage to itself determine if it embodied the important constitutional protections of the Constitution's venue provisions was inherently self-defeating. Certiorari should be granted to consider this fundamental constitutional issue.

If petitioner was entitled not to be tried in the Middle District of Florida for willful failure to file income tax returns, because when those omissions allegedly occurred, he did not have his permanent residence there – the circumstance that legally determines

venue for this offense – then a jury in that District could not constitutionally be the appropriate body to decide whether venue was properly laid. Certainly that same jury could not have decided itself if it was sufficiently "impartial" under the Sixth Amendment, and it similarly should not have been entrusted to determine its own venue. To preserve his Sixth Amendment rights, petitioner sought an evidentiary hearing to establish venue before trial commenced, which the district court denied. Appx. 46-49, 65-67. The court below then upheld the denial of this motion, because "the Sixth Amendment right to have venue proven as an element of the offense is safeguarded by integrating it into the trial. Snipes had a constitutional right to have venue decided by the jury. It did just that." Appx. 19-20. The court of appeals thus misapprehended the nature of the constitutional right at issue.

The Sixth Amendment does not merely provide "a right to have venue decided by the jury." Rather, it guarantees to the defendant in a criminal case the right to be tried only "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . . ."[7] In other words, proper venue is not a freestanding right; rather, it is an essential attribute of the constitutional right to jury trial, much like – and intertwined with – the requirement

---

[7] *See* Appx. 81.

that the jury be "impartial." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1785, at 662 (1833) (trial by jury under the Sixth Amendment "is at once speedy, impartial, and in the district of the offence"). The decisions of the courts below thus fell short of vindicating the constitutional rights at issue.

This Court has long held a crime consisting of the failure to file a required form is ordinarily "committed," for venue purposes, in the place where the form was required to be filed. *See Travis v. United States*, 364 U.S. 631, 636 (1961), explaining *United States v. Lombardo*, 241 U.S. 73, 76-78 (1916) (failure to file report of harboring of alien prostitute).[8] An individual income tax return must be filed either "in the internal revenue district in which is located the legal residence . . . of the person making the return," 26 U.S.C. § 6091(b)(1)(A)(i), or "at a service center serving the internal revenue district referred to in clause (i)." *Id.*(ii). Under either pertinent subsection of IRC § 6091(b), the place for filing, and thus the venue for the three counts of conviction, turned on the question of petitioner's residence. Accordingly, in this case the parties were in agreement, and the courts below concurred, that a prosecution for the offense of willful failure to file a federal income tax return, 26 U.S.C. § 7203, may be brought in the district where the

---

[8] *See also United States v. Anderson*, 328 U.S. 699 (1946) (failure to submit to military induction).

defendant has his or her legal residence, which is defined, again uncontroversially, as the defendant's "permanent fixed abode." *United States v. Calhoun*, 566 F.2d 969, 973 (5th Cir. 1978); *see also* 18 U.S.C. § 3237 (venue for continuing offenses and offenses "involving the use of the mails").[9]

The question of where petitioner had his "permanent fixed place of abode," for the period from October 2000 through April 2002 was very much in dispute. From the earliest stages of the case, petitioner vigorously and repeatedly challenged the government's presentation of the failure-to-file counts to a Middle Florida grand jury, and the indictment's inclusion of those counts, despite improper venue. He moved to transfer venue under 18 U.S.C. § 3237(b), and also under Fed.R.Crim.P. 18 and 21.[10] All these motions were denied.[11]

Petitioner's concerns were precisely those which led to the colonists' inclusion of a venue grievance in the Declaration of Independence, to the Framers' inclusion of a venue provision in Article III, and to the First Congress's incorporation of a vicinage requirement into the Jury Trial Clause of the Sixth

---

[9] *See* Appx. 81-82.

[10] *See* Appx. 82, 85-86.

[11] He even attempted to bring a collateral order appeal from the denial, since the Sixth Amendment promises that he should not be tried at all, except by a jury "of the state and district wherein the crime shall have been committed." *See* Appx. 75-77.

Amendment: petitioner questioned whether he could receive a fair trial so far from his home, being judged by a jury not selected from his own community. *See generally Duncan v. Louisiana*, 391 U.S. 145, 152-53 (1968); *United States v. Palma-Ruedas*, 121 F.3d 841, 860-62 (3d Cir. 1997) (Alito, J., dissenting in part; reviewing history and policy of venue right), *rev'd*, *United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999) (adopting position advocated by then-Judge Alito's dissent below). Petitioner had a right to have that constitutional objection adjudicated prior to trial.

To be sure, it has long been settled that once the case was set for trial petitioner was *also* entitled to contest the government's venue allegation before the jury, as he did. *See Burton v. United States*, 202 U.S. 344, 381-85 (1906).[12] But if petitioner was – as he contended – entitled *not* to be tried by a jury in the Middle District, then the jury which heard his case was constitutionally incompetent to perform the fact-finding essential to a venue determination. The very same policies that animate the Article III requirement that a trial be held only in the state where the crime was committed and the Sixth Amendment's requirement that the jury for that trial be drawn from that district compel the conclusion that a jury in a challenged location cannot itself be vested with sole authority to determine the propriety of its

---

[12] That is because venue is, in a sense, "an essential element" of the offense, which must be proven at trial. Appx. 17; *see also* Point 2 of this Petition *infra*.

composition. The only way to avoid this paradox, was to *also* afford petitioner Snipes a pretrial judicial determination of the facts, as sought in his venue motions, to ensure that trial, including a jury assessment of the venue allegation, would only occur in the locale where petitioner maintained his permanent residence, and thus where the alleged crime was "committed" for purposes of venue.

Commenting upon Article III's jury-venue provision, Justice Story wrote:

> The object of this clause is to secure the party accused from being dragged to a trial in some distant state, away from his friends, and witnesses, and neighbourhood; and thus to be subjected to the verdict of mere strangers, who may feel no common sympathy, or who may even cherish animosities, or prejudices against him. Besides this; a trial in a distant state or territory might subject the party to the most oppressive expenses, or perhaps even to the inability of procuring the proper witnesses to establish his innocence.

3 Story, *supra*, § 1775, at 654. The Sixth Amendment elaborates on an accused person's historic right to be tried only "by an impartial jury" chosen in the "district wherein the crime shall have been committed." U.S. Const. amend. VI.[13] *See United States v.*

---

[13] Section 2, Clause 3, of Article III states, in pertinent part: "The trial of all Crimes . . . shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been

(Continued on following page)

*Cabrales*, 524 U.S. 1, 6 & n.1 (1998).[14] This Court's understanding and explanation of the critical interests served by this protection have never varied:

> To require a citizen to undertake a long journey across the continent to face his accusers, and to incur the expense of taking his witnesses, and of employing counsel in a distant city, involves a serious hardship, to which he ought not to be subjected if the case can be tried in a court of his own jurisdiction.

*Hyde v. Shine*, 199 U.S. 62, 78 (1905).

As the court below recognized, "'questions of venue . . . are not to be taken lightly or treated as mere technicalities. . . .'" Appx. 17 (quoting Circuit precedent). Indeed, the threat of unfair prosecution in a remote and potentially hostile location requires that the important right of a defendant to trial by jury include that the jury be located only in the proper venue and drawn from the proper vicinage.

---

committed. . . ." As this Court has pointed out, the right protected by Article III is properly described as "venue," while the jury right in the Sixth Amendment reflects the principle of "vicinage." *See Williams v. Florida*, 399 U.S. 78, 93-97 & n.35 (1970).

[14] Indeed, as this Court noted, one of the colonists' grievances against the tyranny of King George III, as expressed in the Declaration of Independence, was the holding of trials far from the place where the offense was allegedly committed. Indeed, the guarantee of trial by a jury convened in the proper venue may be the only example of an individual right that is addressed in all three of the Declaration, the original Constitution, and the Bill of Rights.

*See United States v. Cores*, 356 U.S. 405, 407 (1958) (venue right "is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place"). Moreover, the Sixth Amendment Jury-Vicinage Clause also vindicates the interests of the community itself, wronged by a crime, in bringing its moral judgments to bear and in seeing justice done. Akhil R. Amar, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES 123-24 (1997). Since the "venue right" is a structural component of the right to jury trial, *see United States v. Wood*, 299 U.S. 123, 142-43 (1936), entrusting the venue question solely to the very sort of body that the Framers said could not decide *any* issue in the case (that is, a jury convened in the wrong district) cannot be the correct result. The procedure followed here did not serve to ensure that "the accused shall enjoy the right" (U.S. Const. amend. VI) that is guaranteed in Article III and further protected in the Bill of Rights.

The language of this Court's most recent venue decision supports petitioner's position. When determining where trial of a count should be held, the Court explained, "*a court must* initially identify the conduct constituting the offense (the nature of the crime) and then *discern the location of the commission of the criminal acts*." *Rodriguez-Moreno*, 526 U.S. at 279 (emphasis added). This Court did not say that the "court [*i.e.*, a judge] must discern the *alleged* location," but rather "*the* location." The court below thus overlooked this Court's most recent authoritative explication of how the jury-venue right is to be

enforced. It is simply illogical to suppose that the right not to be tried by a jury in a certain place can be meaningfully vindicated by putting the question of what place that is only to a jury selected in the disputed location. The Framers, based on their knowledge of and experiences with abusive practices of the Crown in haling colonists to trials in remote locations including England, did not trust such juries.

The alternative, readily available, is a pretrial evidentiary hearing. Here, the district court refused to allow a process by which it could fulfill its obligation to discern the authorized location for trial of the failure-to-file counts. The court below did not explain how the jury in the trial held in the challenged locale could have vindicated the constitutional right to have a jury from a particular district, and not any other, decide the case.

In general, the procedure for adjudicating a constitutional claim must be designed to preserve, not to defeat, the right itself. *See, e.g., United States v. Broce*, 488 U.S. 563, 571 (1989) (defendant may be entitled to "a trial-type proceeding" prior to jury trial on second indictment if needed to establish claim of double jeopardy). Sometimes, this means a question must be decided twice. *See* 18 U.S.C. § 3501(a) (defendant entitled both to pretrial hearing on admissibility of alleged confession *and* to contest statement's credibility and evidentiary weight before jury at trial); *Lego v. Twomey*, 404 U.S. 477 (1972); *Jackson v. Denno*, 378 U.S. 368 (1964) (right to file motion to suppress

does not prevent defendant from challenging "confession" at trial). So, too, in this context, the nature of the right may call for both a pretrial and a trial proceeding. Petitioner was entitled, by analogy, to a "trial-type proceeding," that is, an evidentiary hearing, to show *before trial*, that he was not a permanent resident of the Middle District of Florida on or around the dates alleged in Counts 3 through 5. At such a hearing, he could have testified on the question of his permanent residence, offering what would have been the best possible evidence on that subject.

The courts below could have avoided the constitutional issue on statutory grounds, but an erroneous procedural ruling thwarted that outcome. A defendant charged with failure to file tax returns, 26 U.S.C. § 7203, enjoys a special right to a transfer of venue to his district of residence, upon demand, *even if* the indictment could constitutionally be brought in some other district. 18 U.S.C. § 3237(b). The statute requires that "the motion [be] filed within twenty days after arraignment. . . ."[15] Petitioner invoked this right by pretrial motion, within the deadline set for such motions by the district court, but his motion was dismissed as untimely. Appx. 47-48, 68-69. The court below affirmed, holding that the § 3237 period is rigid and non-extendible. Appx. 12-16.

---

[15] *See* Appx. 82.

The ruling was in error. The 20-day deadline of § 3237(b) is no longer effective, because it was superseded by a later-adopted general procedural rule on motions, now found at Fed.R.Crim.P. 12(c).[16] Under the Rules Enabling Act, when a Rule of Procedure is enacted or amended, "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." 28 U.S.C. § 2072(b). The clause referencing IRC § 7203 was added to § 3237(b), the venue statute, in 1966 (Pub.L. 89-713, § 2, 80 Stat. 1108). In 1974, Criminal Rule 12 was amended to add subsection (c), placing the time for filing all pretrial motions subject to the trial judge's control.[17] Accordingly, the amendment to Rule 12, being entirely procedural in nature, superseded the statutory 20-day limit.[18] *See also* Fed.R.Crim.P. 21(d) ("A motion to

---

[16] This Rule states that "The court may, at the arraignment or as soon thereafter as practicable, set a deadline for the parties to make pretrial motions. . . ." Rule 12(c) is not qualified by any such phrase as "Except as otherwise provided by statute."

[17] Since their initial adoption in 1944, the Rules had granted the district court discretion to allow the filing of pretrial motions "within a reasonable time" after arraignment. Fed.R.Crim.P. 12(b)(3) (1944). The Advisory Committee expressly noted in 1944 that the rule superseded then-existing fixed statutory deadlines.

[18] The priority of Rules over statutes established by § 2072 as to matters of procedure is fundamental to the relationship between Congress and the courts. Moreover, it is commonplace for the Rules to deal in one general way with similar issues that had formerly been addressed in a plethora of particular statutory provisions. It is therefore immaterial whether § 3237(b) is more "specific" than Rule 12. *Cf. J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred International, Inc.*, 534 U.S. 124, 137 n.9 (2001)

(Continued on following page)

transfer may be made at or before arraignment or at any other time the court or these rules prescribe.").[19] The only other Circuit to have addressed the question of Rule 12 motion-scheduling discretion in relation to motions under 18 U.S.C. § 3237(b) has agreed that the 20-day statutory deadline is subject to extension in the trial court's discretion. *United States v. Humphreys*, 982 F.2d 254, 260 (8th Cir. 1992).[20] Had transfer of the failure-to-file counts been granted, or its denial reversed, the constitutional issue would not have had to be decided. *See Tinsley v. Treat*, 205 U.S. 20 (1907) (statute construed to allow arrestee a pre-removal inquiry into the facts underlying an

---

(referring to the specific/general maxim as a mere "purported rule," which applies at best where the meaning of one statute is "unresolved"); *Busic v. United States*, 446 U.S. 398, 406-07 (1980) (government contested application of "the principle that a more specific statute will be given precedence over a more general one, regardless of their temporal sequence").

[19] Even if the statute still applied, nothing would exempt the 20-day deadline from relaxation under Fed.R.Crim.P. 45(b), the general rule on extensions of time. *United States v. Turkish*, 458 F.Supp. 874, 878 n.8 (S.D.N.Y. 1978) (applying Rule 45 to motion under § 3237(b)). A motion-filing deadline is not jurisdictional in nature. *See Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam) (time to file post-trial motion). Accordingly, the district court did not lack power to modify it. *Compare Bowles v. Russell*, 551 U.S. 205 (2007) (time to file notice of appeal).

[20] Moreover, even if the failure to file a motion under § 3237(b) within 20 days caused a forfeiture of that right, the district court had power to act under Rule 12(e) to grant relief from "waiver" for "good cause" (formerly worded as "cause shown").

indictment's venue allegation); *accord*, *Price v. Henkel*, 216 U.S. 488, 491-94 (1910).

Contrary to the opinion below, Appx. 17-18, petitioner's argument on the constitutional venue issue does not conflict with the principle announced in *Costello v. United States*, 350 U.S. 359 (1956) (no challenge to sufficiency of evidence presented to grand jury); *see also Serfass v. United States*, 420 U.S. 377, 389-94 (1975) (claim that government will not be able to prove element at trial is not cognizable on pretrial motion in criminal case). Petitioner did not seek a pretrial determination of a point that should only be decided at trial, but rather a pretrial ruling on where the jury should be chosen *for* the trial (of all issues) to which he was entitled.[21] Petitioner had a

---

[21] Nor is petitioner's position contrary to the holding in *U.S. ex rel. Hughes v. Gault*, 271 U.S. 142, 149-51 (1926). The majority opinion, authored by Justice Holmes (from which Justice Brandeis dissented on due process grounds), states summarily that a person accused in an indictment "may be required to stand trial wherever he is alleged to have committed the crime." *Id.* 149. But the Court's holding was only that a showing of probable cause (not met by the mere existence of an indictment, which was said only to be *prima facie* proof) was sufficient to justify a defendant's removal from the district of arrest to the district where the indictment was pending; the relator's offer to prove his innocence at the removal hearing was properly disallowed and referred to the trial court. Although the relator apparently invoked his Article III and Sixth Amendment rights, *id.*, the opinion suggests that he may have been confusing venue with jurisdiction when he did so. In any event, no issue concerning a pretrial objection to venue was presented, only a challenge on habeas corpus to the relator's removal from Iowa to Ohio to face an indictment there.

constitutional right to be tried only by a jury selected in the place the offense was committed – and not simply in any place the government alleged that it was committed.

The logical paradox on which petitioner's argument is founded – that if the Framers did not believe a jury in the wrong venue could properly decide the issues in a criminal case, then the Constitution cannot be read to entrust to the sole authority of that same jury the question whether contested facts underlying a venue averment are true – is equally applicable to the suggestion that a court may not look behind a valid indictment, as decided in *Costello* and other such cases. The probable cause determination of a grand jury empanelled in a district other than the one allowed by law lacks the sanctity of a constitutional "grand jury," for the same reason that a jury trial in the wrong district does not satisfy the Sixth Amendment. *See Ex parte Gon-shay-ee*, 130 U.S. 343, 353 (1889) ("Whether a man shall be tried in the county where the offense was committed, or carried to some other county, perhaps hundreds of miles distant, is a matter of much consequence; it is of the venue of the trial. . . . [S]o also as to whether he shall be indicted by a grand jury summoned to serve for the county, and residents of the county, or by such a body summoned from [elsewhere]."); *cf. Midland Asphalt Corp. v. United States*, 489 U.S. 794, 802 (1989) (defendant may bring collateral order appeal from denial of motion claiming "a defect so fundamental that it causes the grand jury no longer to be a grand

jury, or the indictment no longer to be an indictment" within the meaning of the Fifth Amendment Grand Jury Clause)[22]; *In re Groban*, 352 U.S. 330, 346-47 (1957) (Black, J., dissenting) ("The traditional English and American grand jury is . . . selected from the general citizenry of the locality where the alleged crime was committed. They bring into the grand jury room the experience, knowledge and viewpoint of all sections of the community.").

Unlike in *Costello*, and other cases mentioned by the court below, the result of allowing petitioner his pretrial hearing, if he prevailed, would presumably have been a transfer of the case, not a dismissal. Moreover, as petitioner pointed out in his brief on appeal, at a pretrial hearing he could have testified on the question of his permanent residence without having to take the stand at trial. *Cf. Simmons v. United States*, 390 U.S. 377, 389-94 (1968) (testimony given by defendant at suppression hearing to establish Fourth Amendment standing not admissible at trial on issue of possession). It should be emphasized, however, that this Fifth Amendment dilemma was not the principal "constitutional dimension" to his venue issue. *Compare* Appx. 16.[23] The entire question

---

[22] Indeed, on the basis that he had a right not to be tried at all in that District, petitioner even sought a "collateral order" appeal of his venue point prior to trial, only to be rebuffed. *See* Appx. 75-77.

[23] Whether or not the resulting dilemma whether to vindicate his Fifth Amendment rights or his rights under the Sixth was impermissible, Appx. 18-20, deciding the issue of venue only

(Continued on following page)

is of a constitutional nature: what procedure is necessary, in this case and cases like it, to vindicate the Article III and Sixth Amendment rights to be tried not merely by *a* jury, but by a jury *of the kind described in the Constitution*: both "impartial" and "of the State and district wherein the crime shall have been committed."

That there may have been venue in the Middle District of Florida for *other* counts, as the trial court noted, Appx. 65, does not address the issue at hand; venue must be proper for *each* count and is determined separately for each count. *See United States v. Rodriguez-Moreno*, 526 U.S. 275 (1999) (closely analyzing proper constitutional venue for offense of using firearm under 18 U.S.C. § 924(c) where venue for related kidnapping count was not contested). The fundamental basis for petitioner's argument is that a defendant cannot be required to entrust the question of venue, as a factual matter, to the very jury from which he claims the Constitution protects him from being judged.

Trial before a constitutionally incompetent jury satisfies this Court's definition of a structural error, *see United States v. Gonzalez-Lopez*, 548 U.S. 140, 148-49 (2006); *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986), and thus cannot be excused as harmless. To address the important questions concerning the means

---

at trial did in fact have the effect of keeping out some of the best evidence on that subject.

for enforcing Article III's jury trial and venue guarantees and the Sixth Amendment's Jury-Vicinage Clause, this Court should grant a writ of certiorari.

**2. This case presents an additional Fifth and Sixth Amendment issue of national importance: whether venue, a fact necessary to the conviction in a criminal case, can be established by a mere preponderance of the evidence.**

The widespread judicial assertion that venue in a criminal case need not be established by anything more than a preponderance of the evidence cannot co-exist with this Court's cases holding that every fact which is essential to the conviction and to determine the available maximum punishment – of whatever sort, however labeled, and regardless of historical tradition – must be proven beyond a reasonable doubt. *United States v. Gaudin*, 515 U.S. 506 (1995); *In re Winship*, 397 U.S. 358, 364 (1970); *accord*, *United States v. Booker*, 543 U.S. 220, 230 (2005). Whether venue is properly classified as an "element" of the offense for other purposes is not important; in *Ring v. Arizona*, 536 U.S. 584, 588-89 (2002), the Court "reaffirmed [its] conclusion that the characterization of critical facts [as 'elements' or not] is constitutionally irrelevant," citing *Booker*, 543 U.S. at 231. In petitioner's case, seemingly settled Circuit precedent collided head on with this Court's principled doctrine.

As this Court has made abundantly and repeatedly clear, the Fifth and Sixth Amendments do not countenance convictions premised on the finding of essential facts by less than the reasonable doubt standard. A preponderance standard of proof for venue cannot survive this Court's unbroken string of cases, from *Jones v. United States*, 526 U.S. 227 (1999), through *Cunningham v. California*, 549 U.S. 270 (2007). *See also Harris v. United States*, 536 U.S. 545, 557-66 (2002) (interpreting *Apprendi* as holding that any fact that increases a sentence beyond the maximum must be treated as an element of an aggravated offense). That principle echoed the Court's approach in a variety of cases, from *Victor v. Nebraska*, 511 U.S. 1 (1994), and *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (jury must be clearly instructed on reasonable doubt), to *Patterson v. New York*, 432 U.S. 197, 215 (1977) (prosecution "must prove every ingredient of an offense beyond a reasonable doubt"), and *County Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979) (burden-shifting devices must not "undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the *ultimate* facts beyond a reasonable doubt") (emphasis in original).

Most of the Courts of Appeals recognize – as did the court below – that "venue is an essential element of the government's proof at trial." Appx. 17; *see also* cases cited at n.24 *post*. By "element" in this context, the courts simply mean a fact which the government must prove if the defendant is to be found guilty. Yet at trial, the jury was instructed, in accordance with

settled precedent, to decide the venue issue by a preponderance of the evidence. Tr. 1/29/08, at 185. The defense did not object, which is understandable given the state of Circuit law. The court below held that the burden of proof on the government to prove venue at a criminal trial is only a preponderance of the evidence, thus finding no error, much less plain error. *See* Appx. 20 n.7; *United States v. Stickle*, 454 F.3d 1265, 1271-72 (11th Cir. 2006) (circuit "precedent is well established and clear" on this point).

Every Circuit follows this same rule as to the burden of proof.[24] Most if not all of these lines of authority in each Circuit can be traced to the same source: the opinion in *Dean v. United States*, 246 F.2d 335 (8th Cir. 1957). That case reasons (in contradiction to most Circuits' more recent authority) that "[v]enue is not an integral part of a criminal offense," *id.* 338, and goes on to say, without more, that "we have held, need not be proven beyond a reasonable

---

[24] *See United States v. Lenoue*, 137 F.3d 656, 661 (1st Cir. 1998) ("not an element"); *United States v. Rommy*, 506 F.3d 108, 119 (2d Cir. 2007); *United States v. Perez*, 280 F.3d 318, 329-30 (3d Cir. 2002); *United States v. Griley*, 814 F.2d 967, 973 (4th Cir. 1987) ("not an element"); *United States v. White*, 611 F.2d 531, 535 (5th Cir. 1980); *United States v. Charlton*, 372 F.2d 663, 665 (6th Cir. 1967) (dictum); *United States v. Knox*, 540 F.3d 708, 714 (7th Cir. 2008); *United States v. Black Cloud*, 590 F.2d 270, 272 n.2 (8th Cir. 1979); *United States v. Powell*, 498 F.2d 890, 891 (9th Cir. 1974); *United States v. Hamilton*, 587 F.3d 1199 (10th Cir. 2009); *United States v. North*, 910 F.2d 843, 912 n.52 (D.C.Cir. 1990) (per curiam), *modified in other respects on rehearing*, 920 F.2d 940 (D.C.Cir. 1990) (per curiam).

doubt." *Id.* The opinion cited for the latter claim, however – *Blair v. United States*, 32 F.2d 130 (8th Cir. 1929) – says no such thing. It merely observes that "the great weight of the ruled cases" holds that venue "even in a criminal case, need not be proved beyond a reasonable doubt," citing a legal encyclopedia that counted eleven states as rejecting a reasonable doubt rule and two for it, as of about ten to twenty years earlier.[25] *Id.* 132.[26] Moreover, the *holding* of *Blair* was not actually as stated in *Dean* (the foundation of the Circuits' precedential lines). Rather, the Eighth Circuit in *Blair* actually ruled as follows: "But the learned trial judge included venue, as among the things in the case, which should be proved beyond a reasonable

---

[25] The sole citation for this point in *Blair* reads, "13 Encyc. of Evidence 931." The reference is apparently to THE ENCYCLOPÆDIA OF EVIDENCE, edited by Edgar W. Camp, published in 14 volumes between 1902 and 1909 and supplemented biennially until about 1919. At pages 931-32 of volume 13 (with a publication date of 1909), this treatise states, in full, "The general rule seems to be that venue need not be proved beyond a reasonable doubt, though in some jurisdictions it is held to the contrary."

[26] Today (and since its promulgation in 1962), the Model Penal Code of the American Law Institute advises legislatures to treat venue as an element of a criminal offense and to require its proof beyond a reasonable doubt. ALI, MODEL PENAL CODE (OFFICIAL DRAFT) §§ 1.12(1), 1.13(9)(c), at 16, 18 (1985). For a discussion of the current division of opinion on this issue among state courts, *see* 4 Wayne R. LaFave, Jerrold H. Israel, Nancy J. King & Orin S. Kerr, CRIMINAL PROCEDURE § 16.1(g), at 749-50 (3d ed. 2007). The Annotation found at 67 A.L.R.3d 988 (1975 & cum. supp.) identifies 19 states as currently applying a reasonable doubt burden to proof of venue in criminal cases. *See id.* § 6.

doubt; so the point is not before us here." *Id.* (punctuation original).

In short, the lower courts' precedent on the burden of proof issue actually rests on the weakest of jurisprudential foundations, pure dictum which does not even express a firm view on the question, and has never been examined seriously on its merits. The entire edifice of authority is a house of cards. This Court, on the other hand, has never directly addressed this frequently recurring and fundamental issue. As the Court ruled in *Gaudin*, a long-standing practice must nonetheless be rejected if it is contrary to constitutional requirements for a jury trial under the Bill of Rights. 515 U.S. at 518-19.

Ultimately, it is the interests of the criminal justice system that most require an unflagging adherence to the reasonable doubt standard:

> [U]se of the reasonable doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.

*Winship*, 397 U.S. at 364. The concern for public confidence expressed in *Winship* also underlies the constitutional guarantees relating to venue, which were of critical significance to the Framers. As Justice Frankfurter wrote for the Court in *United States v. Johnson*, 323 U.S. 273, 276 (1944), venue is a matter

that "touch[es] closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests."

As already noted, *In re Winship* holds that the government must prove beyond a reasonable doubt "every fact necessary to constitute the crime with which [a defendant] is charged." 397 U.S. at 364. The underlying rationale for that requirement stems from the most fundamental tenets of our jurisprudence. As this Court explained:

> The reasonable doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'

*Id.* at 363, quoting *Coffin v. United States*, 156 U.S. 432, 453 (1895). This Court's analysis in those cases echoes its assessment of the jury-venue protections in the Constitution, which, as noted in *Johnson*, "are not merely matters of formal legal procedure[,]" but rather implicate "deep issues of public policy. . . ." 323 U.S. at 276; *see also Travis v. United States*, 364 U.S. 631, 634 (1961). These policy rationales contradict the attempts by some of the Circuits to justify application

of a reduced standard for proving venue, to the extent that any of the lower courts' cases even attempt to justify the dominant rule.

None of the Circuits' precedent supporting the use of a preponderance standard for factually disputed questions of venue has any substantial foundation in law or logic. The Third Circuit has perhaps ventured the most ambitious attempt to explain the lower courts' adherence to the preponderance rule, although its effort ultimately fails. Attempts to explain the conventional rule generally involve describing venue as "procedural" or "akin to jurisdiction," rather than "substantive," that is, "it does not either prove or disprove the guilt of the accused." *United States v. Perez*, 280 F.3d 318, 330 (3d Cir. 2002) (quoting other circuits). These explanations fall short, as the same could be said for the proof of jurisdictional facts including interstate or international travel or effect-on-commerce elements of numerous federal offenses, of mailing elements for others, or of commission of an offense within the statute of limitations.[27] Yet all of these are jury questions decided uncontroversially beyond a reasonable doubt. *See, e.g., United States v. Robertson*, 514 U.S. 669 (1995) (per curiam); *Schmuck v. United States*, 489 U.S. 705, 708 n.3 (1989). For these reasons, a Fifth Circuit panel, in light of this Court's more recent Due Process

---

[27] *See, e.g.*, Sand, Siffert, *et al.*, MODERN FEDERAL JURY INSTRUCTIONS § 19.01.

and Jury Trial Clause decisions, has expressed "doubt that a mere preponderance of the evidence on [a jurisdictional] element could suffice to support a guilty verdict." *United States v. Perrien*, 274 F.3d 936, 939 n.1 (5th Cir. 2001) (per curiam).

The lack of objection at petitioner's trial is not a significant factor in these circumstances. In the similar case of *Gaudin*, this Court fully addressed the merits of the Sixth Amendment issue arising out of a jury instruction (that materiality, although an element of the offense, was to be determined by the court as a question of law), although the issue apparently arose there in a plain error posture as well. *See* 515 U.S. at 523 (Rehnquist, Ch.J., concurring). So here, the charge allowing a minimal burden of proof to suffice on the issue of venue was plain constitutional error, likely prejudicial to petitioner on the counts of conviction, and capable of causing the courts to fall into public disrepute. *See* Fed.R.Crim.P. 52(b); *see also United States v. Marcus*, 560 U.S. —, 130 S.Ct. 2159, 2164-66 (2010) (discussing third and fourth prongs of "plain error" test).[28]

---

[28] *See also Black v. United States*, 561 U.S. —, 130 S.Ct. 2963, 2969 (2010) (noting that it was "undisputed" that Black at trial had preserved issue later decided in *Skilling v. United States*, 561 U.S. —, 130 S.Ct. 2896 (2010), although his cited jury charge objection had addressed a different aspect of 18 U.S.C. § 1346 entirely; yet the majority held that "by properly objecting to the honest services jury instructions at trial, Defendants secured their right to challenge those instructions on appeal," *id.* at 2970); *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 125 (2007) (an issue can be adequately raised and

(Continued on following page)

For these reasons, regardless of its answer to the first question presented in this petition (the right to a preliminary non-jury determination of venue, where the facts are disputed), the need for the strictest standard of proof, in order to protect the constitutional right to jury trial in the correct venue is of the utmost constitutional significance. The questions that juries are normally asked to decide by a preponderance of the evidence – liability and damages in routine civil cases – do not compare in importance to the question whether a criminal jury trial has been convened in a place permitted or prohibited by the Constitution for reasons deemed critical to the Framers.

In this case, the difference in burdens could not be deemed harmless, even if an error of this sort is not treated as "structural" on plain error review. *See Marcus*, 130 S.Ct. at 2164-65, citing *Sullivan v. Louisiana*, 508 U.S. 275 (1993). The application of a heightened burden of proof would likely have changed the verdict on the few counts where the jury convicted. As fully recited in the statement of facts, venue was vigorously disputed on the failure-to-file charges throughout the trial. Direct evidence supported petitioner's argument that venue was laid on those

---

preserved for this Court's review by passing mention below, where squarely contrary to circuit precedent and in counsel's sound judgment additional "argument would be futile"). The question of burden of proof was raised by petitioner in his appellate brief, CA11 Br. 28-29 & n.22, expressly as a point he intended to preserve for review at a higher level.

counts in violation of Article III and of the Sixth Amendment, and (as shown in the Statement of Facts, *ante*) could readily have raised a reasonable doubt on that score. Petitioner Snipes was tried far from home and family, where neighbors would have had to travel a thousand miles or more to testify about where he actually resided, by a jury drawn from a venire composed of people who were strangers to him and his community.

On the issue of proof of venue, entrenched Circuit precedent persists in conflict with this Court's leading authority. Because the affirmance of petitioner's conviction by the court below depended on the widespread misapplication of an important constitutional doctrine, certiorari should be granted.

## CONCLUSION

For the foregoing reasons, the petitioner, Wesley Trent Snipes, prays that this Court grant his petition for a writ of certiorari, and reverse the judgment of the United States Court of Appeals for the Eleventh

Circuit affirming the judgment of conviction and sentence.

Respectfully submitted,

SAMUEL J. BUFFONE
BRIAN P. KELLY
BUCKLEYSANDLER LLP
1250 24th St., NW, Suite 700
Washington, DC 20037
(202) 349-7940
SBuffone@BuckleySandler.com

PETER GOLDBERGER
*Counsel of Record*
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net

*Of Counsel:*
DANIEL R. MEACHUM
DANIEL R. MEACHUM & ASSOC., LLC
Centennial Tower, Suite 2400
101 Marietta St., NW
Atlanta, GA 30303
(770) 988-9600
dmeachum@dmeachumlaw.com

*Attorneys for Petitioner*

February 28, 2011

## APPENDIX A

611 F.3d 855

**United States Court of Appeals,**
**Eleventh Circuit.**

UNITED STATES of America,
Plaintiff-Appellee-Cross-Appellant,
v.
Wesley Trent SNIPES,
Defendant-Appellant-Cross-Appellee.

No. 08-12402.
July 16, 2010.

Peter Goldberger, Ardmore, PA, Daniel R. Meachum, Atlanta, GA, Carmen D. Hernandez, Law Offices of Carmen Hernandez, Washington, DC, for Snipes.

Patricia D. Barksdale, Jacksonville, FL, S. Robert Lyons, Alan Hechtkopf, Tax Div., Dept. of Justice, Washington, DC, for U.S.

Appeals from the United States District Court for the Middle District of Florida.

Before MARCUS, FAY and ANDERSON, Circuit Judges.

MARCUS, Circuit Judge:

Defendant Wesley Trent Snipes appeals from his criminal convictions, after a jury trial, on three counts of willful failure to file individual federal income tax returns for calendar years 1999, 2000, and 2001, in violation of 26 U.S.C. § 7203. Snipes alleges that the trial court committed reversible error in sentencing, jury instructions, and on issues of venue.

After thorough review, we affirm the rulings and judgment of the district court in all respects.[1]

## I.

The essential facts adduced at trial and the procedural history are these: Wesley Trent Snipes is a movie actor and owner of film production companies, including Amen RA Films and Kymberlyte Productions. Sometime around the year 2000, Snipes became involved in co-defendant Eddie Ray Kahn's organization, American Rights Litigators ("ARL"), that purported to assist customers in resisting the Internal Revenue Service ("IRS"). ARL employees, including co-defendant Douglas Rosile, and ARL members sent voluminous letters to the IRS, challenging the agency's authority to collect taxes. The centerpiece of this resistance was the "861 argument" that the domestic earnings of individual Americans do not qualify as "income" under 26 U.S.C. § 861, because the earnings do not come from a listed "source."[2]

---

[1] The government has also cross-appealed the district court's denial of a "sophisticated means" enhancement in imposing Snipes's sentence, but says that this cross-appeal would be appropriate only if the Court concluded that the district court had erred in calculating Snipes's sentence. Because we can discern no error, the government's cross-appeal is moot.

[2] Section 861 lists various types of revenue under the heading: "The following items of gross income shall be treated as income from sources within the United States." 26 U.S.C. § 861(a).

The ARL message appeared to have found a welcome audience in Snipes. Although Snipes earned more than thirty-seven million dollars in gross income from 1999 to 2004, he did not file individual federal income tax returns for any of those years. These were not, however, silent years. After meeting with ARL, Snipes began a long conversation with the IRS. He sent treatises describing theories about why the IRS was powerless to collect income taxes from him and several altered tax forms demanding money for taxes he had rendered in earlier years. Thus, for example, in April 2001, Snipes sent an altered form 1040X, styled as an Amended United States Individual Income Tax Return, in which he demanded a refund of over seven million dollars for taxes paid for the calendar year 1997, allegedly paid in error.

Snipes's correspondence with the IRS advanced several arguments justifying his failure to file his personal tax returns, including that he was a "nonresident alien to the United States," that earned income must come from "sources wholly outside the United States," that "a taxpayer is defined by law as one who operates a distilled spirit Plant," and that the Internal Revenue Code's taxing authority "is limited to the District of Columbia and insular possessions of the United States, exclusive of the 50 States of the Union." Snipes also claimed that as a "fiduciary of God, who is a 'nontaxpayer,'" he was a "'foreign diplomat'" who was not obliged to pay taxes. When Snipes consulted his long-time tax attorneys about his resistance to paying federal income taxes,

they advised him that his position was contrary to the law and that he was required to file tax returns. The firm terminated Snipes as a client when Snipes refused to file his tax returns.[3]

Snipes's resistance to the IRS did not stop at his personal filings. Snipes integrated the ALR tax "teachings" into the accounting methodology of his film production companies. After June 2000, his companies stopped deducting payroll and income taxes from employees' salary checks. Snipes began to proselytize this theory of tax resistance. He invited several employees to an "861" educational seminar at his home. When accounts-payable employee Carmen Baker attended the seminar and questioned the "861" theory, Snipes ordered her to leave his house, later

---

[3] The government established at trial that Snipes also filed several other documents with the IRS and the United States Department of Treasury, demanding money. Thus, for example, on April 19, 2000, Snipes sent an altered form 1040X to the IRS, purporting to be a return for the calendar year 1996 and requesting a refund of over four million dollars. After the IRS designated the return as frivolous, Snipes responded, through his representative. He threatened the IRS employee with disciplinary action and demanded the refund with interest. Snipes also sent four fraudulent "non-negotiable bills of exchange" to the United States Department of Treasury, demanding sums ranging from $27,485.31 to $12,000,000.00 as purported "discharge of the public debt." In lieu of tax returns, Snipes sent the IRS "Filing Statement[s] . . . in Affidavit Form" for several years that claimed, *inter alia*, that Snipes "ha[d] never been a 'United States citizen.'" In follow up letters to these "filing statements," Snipes purported to enter default judgment against the IRS for "failure to rebut" his claims.

telling her that he was "disappointed" in her and that if she was "not going to play along with the game plan," she should find another job.

The IRS launched a criminal investigation of Wesley Snipes after the agency received the April 2001 altered form 1040X for the year 1997, demanding refund of over seven million dollars based upon the "861" argument. On October 12, 2006, a grand jury sitting in the United States District Court for the Middle District of Florida returned a superseding indictment, charging Snipes and his two co-defendants, Eddie Ray Kahn and Douglas Rosile, with various crimes relating to a fraudulent tax scheme. Count One charged Snipes, Kahn, and Rosile with conspiracy to defraud the United States by impeding the IRS in its collection of income taxes, in violation of 18 U.S.C. § 371. Count Two charged all three defendants with filing a false claim for a refund of Snipes's taxes, in violation of 18 U.S.C. §§ 2 and 287. Counts Three through Eight charged Snipes alone with six counts of willfully failing to file his individual federal income tax returns for calendar years 1999 through 2004, in violation of 26 U.S.C. § 7203. Each defendant pled not guilty. Snipes surrendered voluntarily and was arraigned on December 8, 2006.

At the time of arraignment, a magistrate judge set a deadline for pretrial motions for January 12, 2007. On January 12, Snipes moved for an extension of time to file motions, due to the complexity of the case and the need to analyze discovery. The magistrate judge granted the extension, resetting the motions

deadline to June 4, 2007, and the trial date to October 2007. On June 4, 2007, Snipes filed several motions, including a motion to transfer venue to the Southern District of New York, under both 18 U.S.C. § 3237(b) and Federal Rule of Criminal Procedure 21(b).

The district court denied Snipes's motion for elective transfer under 18 U.S.C. § 3237(b) as untimely, because it had been filed more than five months past the twenty-day elective transfer period defined by § 3237(b). The district court also denied Snipes's motion to transfer venue under Federal Rule of Criminal Procedure 21(b), determining that Snipes's claim that his wife and children lived in his home in California was insufficient to overcome the hardship a transfer of venue would place on his significantly poorer co-defendants and on many Florida-based witnesses. On Snipes's motion for reconsideration of the venue issue, the court again denied the motion to transfer venue.

In early October 2007, Snipes moved for a continuance after he had fired his counsel for claimed incompetence and hired new lawyers. After the district court granted the continuance, Snipes's new lawyers challenged venue still again, alleging that the government had chosen Ocala County, Florida, for trial for racially discriminatory reasons. Snipes again attempted to make a 18 U.S.C. § 3237(b) statutory transfer election, claiming that the district court could disregard the statutory twenty-day deadline because the ineffective assistance of his prior counsel

constituted "good cause." The trial court denied both venue motions.

After the district court refused to conduct a pretrial evidentiary hearing on the issue of venue, Snipes lodged a notice of appeal with this Court on the venue-related orders. We denied this interlocutory appeal, concluding that an order pertaining to venue was effectively reviewable after the entry of judgment. *United States v. Snipes*, 512 F.3d 1301, 1302 (11th Cir. 2008).

The case proceeded to a fourteen-day trial in January 2008. At trial, an IRS witness testified that although Snipes had regularly filed individual federal income tax returns for the years 1993 through 1998, he had not filed any returns for calendar years 1999 through 2004.

IRS Special Agent Cameron Lalli testified extensively about the investigation of the alleged tax conspiracy. Agent Lalli described a telephone conversation with Snipes and his lawyer in May 2002, during which Agent Lalli had informed Snipes that Snipes was under investigation for tax crimes. When he read Snipes his non-custodial rights, which included the right to remain silent, Snipes replied, "very interesting." In the course of the investigation, the grand jury served subpoenas on the office staff of Amen RA films. Former accounts-payable employee Carmen Baker testified at trial that when she received the grand jury subpoena, Snipes ordered her "not to respond, not to talk to anybody or to disclose

any information on the company." When Baker asked Snipes why she should not respond, Snipes replied, "It doesn't matter. I have [a confidentiality agreement] with your signature on it. . . . [I]f you do contact them, you will have to pay the consequences." According to Baker, Snipes's warning made her feel "very upset," "uneasy," and "scared."

After the government rested its case, Snipes moved for a judgment of acquittal on only the false claim charge (Count Two) and the 1999 failure-to-file charge (Count Three).[4] The motion neither mentioned the first Count nor the other failure-to-file charges contained in Counts Four through Eight of the superseding indictment. The court denied the motions and the defense rested its case without presenting any evidence. The district court denied again any motion for judgment of acquittal at the end of the case.

Snipes requested a specific jury instruction on venue for Counts Three through Eight. The district court granted Snipes's request in full, instructing the jury that the Sixth Amendment protects a defendant's right to a "trial in the state and district wherein the crime shall have been committed." The court

---

[4] As for Count Two, Snipes submitted that the alteration of the jurat on the Form 1040X could not constitute a false claim under 18 U.S.C. § 287. The jurat, the certificate of oath preceding the signature on the tax form, read "[u]nder no penalties of perjury" in the Form 1040X Snipes submitted in 2001. As for Count Three, he argued that the 1999 failure-to-file charge was barred by the statute of limitations.

instructed the jury that the government must prove venue – the district of Snipes's legal residence – by a preponderance of the evidence, and that the jury must acquit Snipes if the government had not met its burden.

Snipes also sought jury instructions on both general good faith and good faith reliance upon the advice of counsel to supplement the standard willfulness instructions. The district court granted these requests, too, and instructed the jury that "[g]ood faith is a complete defense to the charges in the indictment since good faith on the part of the Defendant is inconsistent with intent to defraud or willfulness which is an essential part of the charges." The judge reminded the jury that the government was obliged to prove willfulness beyond a reasonable doubt and that the defendant had no burden to prove good faith. The court also gave Snipes's good faith instruction on intent, telling the jury that "one who expresses an honestly held opinion or an honestly formed belief is not chargeable with fraudulent intent, even though the opinion is erroneous or the belief is mistaken." As for good faith reliance upon counsel, the trial court instructed that willfulness could not be found if Snipes had consulted in good faith with an attorney and strictly complied with the attorney's advice.

Snipes also sought an instruction on good faith reliance based upon the Fifth Amendment, explaining that if he "had a good faith belief in his right to assert his [Fifth Amendment] privilege not to incriminate

himself then [he] would not be guilty of acting willfully." Snipes claimed that he believed he had a Fifth Amendment privilege not to file his personal income tax returns because Special Agent Lalli advised him of his right to remain silent. The district court declined to give this instruction, observing that there was no evidence that Snipes had directly asserted his Fifth Amendment right as a basis for refusing to file his federal income tax returns. Snipes's counsel did, however, argue to the jury in closing that Snipes's reliance on Agent Lalli's pre-interview advice of rights constituted a good faith basis for his failure to file his individual income tax returns.

On February 1, 2008, the jury convicted co-defendants Kahn and Rosile on Counts One and Two (the conspiracy and false claim charges), but acquitted Snipes on the same charges. The jury convicted Snipes, however, on Counts Three, Four, and Five, for the willful failure to file individual federal income tax returns for calendar years 1999, 2000, and 2001. The jury acquitted Snipes on Counts Six, Seven, and Eight, the failure-to-file charges for 2002, 2003, and 2004.

The probation office's presentence investigation report ("PSI") recommended that Snipes be assigned a base offense level of 28 under U.S.S.G. §§ 2T1.1(a) and 2T4.1. The PSI measured Snipes's intended tax loss at $41,038,051, and assigned a two-level increase under U.S.S.G. § 2T1.1(b)(2), determining that Snipes had used sophisticated means to hide assets from taxation by using foreign accounts. The PSI also recommended a two-level increase pursuant to U.S.S.G.

§ 3C1.1, because Snipes had obstructed justice by directing Carmen Baker to conceal evidence from a federal grand jury investigation. Finally, the PSI recommended a guidelines sentence of thirty-six months' imprisonment. Snipes objected to the PSI's sentencing recommendations and challenged the PSI's reliance on any extra-verdict facts for enhancing his sentence. Snipes also objected that the obstruction of justice adjustment was unsupported, because Baker's testimony was unreliable.

The district court sentenced Snipes on April 24, 2008. Before the sentence was pronounced, Snipes challenged the tax sentencing regime, arguing that the Sentencing Commission had contravened 28 U.S.C. § 994(j) by not providing probation for non-serious offenses. The district court rejected this claim, observing that, although Snipes's crimes were not felonies, Congress had deemed them to be serious. The court also overruled Snipes's objection to the obstruction-of-justice enhancement. The court did, however, sustain Snipes's objection to a sophisticated-means enhancement. Snipes called several character witnesses who testified on his behalf. The district court calculated the guidelines range, specifically observed that the Sentencing Guidelines were advisory, and discussed each of the factors enumerated in 18 U.S.C. § 3553(a). The court sentenced Snipes to a total term of thirty-six months' imprisonment, comprised of three one-year terms for the failure-to-file convictions, to be served consecutively, followed by

one year of supervised release and a $75 special assessment fee.

Snipes timely appealed and the government cross-appealed.

## II.

### A.

We examine first whether the district court erred by denying Snipes's June 4, 2007, statutory elective transfer under 18 U.S.C § 3237(b) as being untimely. Snipes claims that when the magistrate judge extended the pretrial motions deadline, the new deadline necessarily extended the period of time in which he was allowed to elect to transfer his trial. This theory rests on the notion that Rule 12(c)'s provision that a district court may set deadlines for pretrial motions somehow supersedes § 3237(b)'s command that an election to be tried in the district in which the defendant resided must be filed within twenty days after arraignment. Fed.R.Crim.P. 12(c).[5] Snipes also claims that the district court abused its discretion when it denied Snipes permission to make a late statutory elective transfer on the basis of his former counsel's "excusable neglect," under Federal Rule of Criminal Procedure 45(b)(1)(B).

---

[5] Fed.R.Crim.P. 12(c) provides that "[t]he court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing."

We review a district court's denial of a motion on the grounds of untimeliness for abuse of discretion. *United States v. Smith*, 918 F.2d 1501, 1509 (11th Cir. 1990). However, we review *de novo* Snipes's argument that Rule 12(c) of the Federal Rules of Criminal Procedure supersedes the twenty-day deadline contained in § 3237(b). *United States v. Jackson*, 544 F.3d 1176, 1181 n. 1 (11th Cir. 2008) (per curiam).

The proper venue for the crime of willfully failing to file an individual federal income tax return, in violation of 26 U.S.C. § 7203, is either the federal judicial district in which the defendant resided at the time of the offense or the judicial district of the designated service center. *United States v. Calhoun*, 566 F.2d 969, 973 (5th Cir. 1978).[6] Title 18 U.S.C., § 3237(b) provides that a defendant facing a failure to file charge

> may upon motion filed in the district in which the prosecution is begun, elect to be tried in the district in which he was residing at the time the alleged offense was committed: *Provided*, That the motion is filed within twenty days after arraignment of the defendant upon indictment or information.

Congress placed particular emphasis on the deadline, underlining the limiting word "provided" in the

---

[6] In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*), we adopted as binding precedent the decisions of the former Fifth Circuit rendered before the close of business on September 30, 1981.

text of the statute. The deadline was specified "[i]n order to prevent dilatory transfers by defendants." S. Rep. 85-1952, at 3 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3261, 3263.

In the first place, "[c]ourts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language." *United States v. Albertini,* 472 U.S. 675, 680, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985). Section 3237(b)'s twenty-day statutory deadline for an elective transfer is unambiguous and unqualified. *See Abrams v. McGohey,* 260 F.2d 892, 893-94 (2d Cir. 1958) (per curiam). The Supreme Court has strictly construed clear statutory deadlines limiting periods for filing motions in criminal cases, holding that there is "simply no room in the text" of more general criminal rules to supersede Congress's clear directions in criminal statutes. *See Carlisle v. United States,* 517 U.S. 416, 421, 116 S.Ct. 1460, 134 L.Ed.2d 613 (1996). Unlike deadlines derived only from Court rules, statutory deadlines that "achieve a broader system-related goal" are "more absolute." *See John R. Sand & Gravel Co. v. United States,* 552 U.S. 130, 133-34, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008). The unmistakeable statutory deadline in § 3237(b) cannot be waived by a general extension of the motions deadline under Rule 12(c). The language employed by Congress is fatal to this claim.

We add that "[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of

enactment." *Morton v. Mancari,* 417 U.S. 535, 550-51, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). Plainly, Congress showed no "intention," clear or otherwise, that Rule 12(c) would control the tax statute; the rule of procedure never even mentions the crime of failure to file a federal income tax return. It merely affords the district court the discretion to set pretrial deadlines. Section 3237(b), in sharp contrast, is specific to the offense at hand and is a controlling exception to Rule 12(c)'s discretion. *See ConArt, Inc. v. Hellmuth, Obata + Kassabaum, Inc.,* 504 F.3d 1208, 1210 (11th Cir. 2007).

Indeed, construing Rule 12(c) to supersede the command of Congress embodied in § 3237(b)'s unambiguous deadline would repeal, by judicial fiat, an unambiguous provision found in a congressional enactment. Because the general extension of the motions deadline could not have waived § 3237(b)'s clear twenty-day deadline, the district court's denial of the five-month late elective transfer motion was not an abuse of discretion.

Nor did the district court abuse its discretion by refusing to grant a waiver of the statutory deadline on the theory of "excusable neglect" under Rule 45 of the Federal Rules of Criminal Procedure because Snipes's original attorney misunderstood the import of the statutory elective transfer deadline. "[C]ounsel's misunderstanding of the law cannot constitute excusable neglect." *Corwin v. Walt Disney Co.,* 475 F.3d 1239, 1255 (11th Cir. 2007) (citation and quotation marks omitted).

Finally, it would not have been reasonable anyway to read Snipes's general request for an extension of time to file motions as a request to suspend the § 3237(b) transfer deadline. Snipes's putative motion for elective transfer would already have been two weeks late when his attorneys first requested an extension of time to file motions. The twenty-day deadline for the § 3237(b) election expired on December 28, 2006; Snipes's motion for extension of time to file pretrial motions was not filed until January 12, 2007. Indeed, Snipes's motion for extension of the pretrial motions deadline did not discuss the § 3237(b) venue election at all. In short, there is no indication that even Snipes considered a § 3237(b) transfer election to be governed by the pretrial motions deadline at the time that he moved for the extension.

B.

Snipes also argues that the district court abused its discretion by not conducting a pretrial evidentiary hearing – essentially, a bench trial – on venue. He says that a pretrial evidentiary hearing was essential because, if the choice of venue were improper, a jury sitting in the Middle District of Florida would be the wrong decision-maker to decide the question. This claim purportedly has a constitutional dimension: Snipes submits that by denying a pretrial evidentiary hearing, the district court forced him to choose between presenting the best evidence – his own testimony – on this disputed fact and invoking his Fifth Amendment privilege against self-incrimination.

We review for abuse of discretion the district court's denial of a pretrial motion for an evidentiary hearing to challenge venue. *United States v. Diaz,* 811 F.2d 1412, 1414 (11th Cir. 1987). However, we review Snipes's argument that the denial of a pretrial evidentiary hearing violated his Fifth Amendment rights *de novo. United States v. Brown,* 364 F.3d 1266, 1268 (11th Cir. 2004).

It is by now well-settled that venue is an essential element of the government's proof at trial. "[Q]uestions of venue . . . are not to be taken lightly or treated as mere technicalities. . . ." *United States v. White,* 611 F.2d 531, 534 (5th Cir. 1980). "The Constitution, the Sixth Amendment, and Rule 18 of the Federal Rules of Criminal Procedure guarantee defendants the right to be tried in the district in which the crime was committed." *United States v. Breitweiser,* 357 F.3d 1249, 1253 (11th Cir. 2004).

As with resolving other important elements contained in a charge, a jury must decide whether the venue was proper. *See Green v. United States,* 309 F.2d 852, 857 (5th Cir. 1962) ("We hold that the trial court erred in failing to submit the question of venue to the jury."). *See also United States v. Stickle,* 454 F.3d 1265, 1273 (11th Cir. 2006); *United States v. Muhammad,* 502 F.3d 646, 656 (7th Cir. 2007). In this case, the grand jury returned a facially sufficient indictment, with a clear statement of venue. Counts Three through Eight identified both Snipes's residence (Windermere, Florida) and the location of the crime (the Middle District of Florida). "An indictment

returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on the merits." *Costello v. United States,* 350 U.S. 359, 363, 76 S.Ct. 406, 100 L.Ed. 397 (1956) (footnote omitted).

Indeed, it would not have been proper for the district court to find the appropriate venue in a pretrial evidentiary hearing. "Under Fed.R.Crim.P. 12(b) an indictment may be dismissed where there is an infirmity of law in the prosecution; a court may not dismiss an indictment, however, on a determination of facts that should have been developed at trial." *United States v. Torkington,* 812 F.2d 1347, 1354 (11th Cir. 1987). To permit preliminary trials on essential facts, post-indictment, would "run counter to the whole history of the grand jury institution, . . . [and] would result in interminable delay but add nothing to the assurance of a fair trial." *Costello,* 350 U.S. at 363-64, 76 S.Ct. 406.

Snipes argues, nevertheless, that under *Simmons v. United States,* 390 U.S. 377, 389-94, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), a pretrial hearing was necessary because a defendant cannot be forced to cede his Fifth Amendment right against self-incrimination in order to enforce his right to testify about venue at trial. In *Simmons,* the Supreme Court held that a defendant's testimony in a Fourth Amendment pretrial suppression hearing cannot be admitted in trial without violating the Fifth Amendment privilege against self-incrimination; it was "intolerable that

one constitutional right should have to be surrendered in order to assert another." *Id.* at 394, 88 S.Ct. 967.

However, *Simmons* has never been extended beyond its context. *See In re Federal Grand Jury Proceedings,* 975 F.2d 1488, 1492-93 (11th Cir. 1992). Only three years after the *Simmons* decision, in *McGautha v. California,* the Supreme Court itself questioned *Simmons*'s rationale of the "intolerable tension" between constitutional rights, explaining that the application of this reasoning was "open to question." *McGautha v. California,* 402 U.S. 183, 212-13, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971), *vacated in part on other grounds sub nom. Crampton v. Ohio,* 408 U.S. 941, 92 S.Ct. 2873, 33 L.Ed.2d 765 (1972). The Supreme Court observed that in many criminal contexts, such as choosing between forgoing testimony at trial or having one's prior criminal acts disclosed, a defendant must make a choice between competing rights. *Id.* at 214-15, 91 S.Ct. 1454. The Supreme Court explained that even though "a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. The threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved." *Id.* at 213, 91 S.Ct. 1454.

Snipes's Sixth Amendment rights were not impaired in this case. Unlike the Fourth Amendment right, protected by the exclusionary rule, the Sixth Amendment right to have venue proven as an

element of the offense is safeguarded by integrating it into the trial. Snipes had a constitutional right to have venue decided by the jury. It did just that. Both parties presented evidence on venue at trial in great detail. Moreover, the district court fully instructed the jury that venue is an element of the offense and that Snipes must be acquitted if the government failed to establish venue by a preponderance of the evidence. There was no abuse of discretion in refusing to grant a novel pretrial, post-grand jury hearing to challenge the claimed venue found in a facially sufficient indictment.[7]

---

[7] In a final challenge to venue, Snipes claims that the district court should have entered a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 for insufficient evidence on venue. But because Snipes's Rule 29 motion only raised evidentiary issues concerning the false claim charge and whether the statute of limitations had expired, we review this issue only for plain error and may reverse only if the error is plain, affects Snipes's substantial rights, and seriously affects the fairness, integrity or public reputation of judicial proceedings. *United States v. Bernal-Benitez*, 594 F.3d 1303, 1312 n. 6 (11th Cir. 2010). There is no plain error here. In establishing venue by a preponderance, *United States v. Wuagneux*, 683 F.2d 1343, 1356-57 (11th Cir. 1982), the government provided ample evidence from which the jury could conclude that Snipes was a Florida resident. Among other evidence, the government showed that Snipes was born in Florida, had maintained a Florida driver's license since 1978, and had averred in several formal documents that his residency was Florida. This is enough to meet a preponderance of the evidence.

C.

Snipes also claims that the district court abused its considerable discretion in declining to give an instruction on Snipes's purported good faith reliance on his Fifth Amendment privilege against self-incrimination. At trial, defense counsel argued that after Agent Lalli had read Snipes his non-custodial rights in May 2002, Snipes believed the "right to remain silent" allowed him to refuse to file his individual federal income tax returns.

A district court has "broad discretion in formulating jury instructions." *United States v. Mintmire*, 507 F.3d 1273, 1293 (11th Cir. 2007).

> In reviewing the denial of a requested jury instruction, we consider whether that instruction: (1) was a correct statement of the law; (2) was not adequately covered in the instructions given to the jury; (3) concerned an issue so substantive that its omission impaired the accused's ability to present a defense; and (4) dealt with an issue properly before the jury.

*United States v. Lyons*, 53 F.3d 1198, 1200 (11th Cir. 1995). The government concedes that Snipes's proposed jury instruction was substantially correct. Nevertheless, Snipes's assignment of error fails.

It is uncontested that willfulness is an important element of 26 U.S.C. § 7203, *Cheek v. United States*, 498 U.S. 192, 193-94, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991), and that "a good faith claim of privilege

against self-incrimination, although erroneous, is a defense to the element of willfulness." *United States v. Goetz*, 746 F.2d 705, 710 (11th Cir. 1984). "[T]he word 'willfully' in these statutes generally connotes a voluntary, intentional violation of a known legal duty." *United States v. Bishop*, 412 U.S. 346, 360, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973). *See also United States v. Morris*, 20 F.3d 1111, 1114 (11th Cir. 1994) ("The standard for the statutory willfulness requirement is the 'voluntary, intentional violation of a known legal duty.'") (quoting *Cheek*, 498 U.S. at 202, 111 S.Ct. 604) (footnote omitted).

The district court's instructions were adequate first because the issue of whether Snipes asserted the Fifth Amendment privilege was not before the jury on the counts for which he was convicted. When Special Agent Lalli read Snipes his non-custodial rights in May 2002, Snipes was already legally obligated to have filed his individual federal income tax returns for the calendar years 1999, 2000, and 2001. Snipes was only convicted of willful failure to file individual federal income tax returns for these three years, contained in Counts Three, Four, and Five. The Fifth Amendment good faith defense – grounded in the *subsequent* May 2002 advice of rights – could not have been relevant to any of the charges of conviction.

Moreover, the good faith and willfulness instructions that the district court delivered were altogether sufficient to cover the good faith reliance on the Fifth Amendment argument anyway. The court instructed the jury that good faith is a complete defense to the

charges in the indictment. The court reinforced that Snipes was under no burden of proving good faith: it was the government's duty to prove that he acted willfully. Further, the court gave the jury Snipes's proposed language on intent, instructing that "one who expresses an honestly held opinion or an honestly formed belief is not chargeable with fraudulent intent, even though the opinion is erroneous or the belief is mistaken." Even though the district court did not specifically identify good faith reliance on the Fifth Amendment in the instruction, the good faith instruction was thorough and substantially covered Snipes's proposed instruction. *Contrast Morris*, 20 F.3d at 1117 (holding that it was error for the district court to refuse to give a general good faith jury instruction at all).

When the instructions omitted are "substantially covered by other instructions which were delivered by the district court," there can be no reversible error. *United States v. Stone*, 702 F.2d 1333, 1339 (11th Cir. 1983). Thus, for example, in *United States v. Pomponio*, the Supreme Court affirmed convictions for willfully filing false income tax returns despite the judge's refusal to give a good faith instruction: "The trial judge in the instant case adequately instructed the jury on willfulness. An additional instruction on good faith was unnecessary." 429 U.S. 10, 13, 97 S.Ct. 22, 50 L.Ed.2d 12 (1976) (per curiam). *See also United States v. Jordan*, 582 F.3d 1239, 1248 (11th Cir. 2009) ("The court did not abuse its discretion in declining to give [the defendant's good faith instructions] because

their concepts were substantially included in the instruction that the criminal act must be done 'knowingly' or 'willfully.'"); *United States v. Johnson*, 577 F.2d 1304, 1312 (5th Cir. 1978) (no reversible error in a district court's refusal to give an instruction on the defendant's good faith reliance on his constitutional rights because the jury was instructed both on willfulness and good faith); *United States v. McCarty*, 665 F.2d 596, 597 & 597 n. 2 (5th Cir. 1982) (affirming tax conviction where judge gave general good faith and willfulness instructions, but did not instruct on a good faith reliance on Constitutional rights). *Pomponio*, *Jordan*, and *Johnson* are controlling here: the instructions concerning general good faith, good faith reliance on counsel, and willfulness sufficiently addressed Snipes's argument that he relied in good faith on the Fifth Amendment.

Finally, the omission of the instruction in no way "impaired the accused's ability to present a defense." *Lyons*, 53 F.3d at 1200. The district court allowed Snipes's attorneys to thoroughly cross-examine witnesses on the subject of Snipes's good faith reliance on the Fifth Amendment. And defense counsel squarely presented the argument to the jury in closing. *Contrast Goetz*, 746 F.2d at 712 (holding that the court's refusal to allow the defendant to present evidence of good faith was error in a 26 U.S.C. § 7203 prosecution). Indeed, the defense was arguably successful: the jury acquitted Snipes of the willful failure-to-file charges for 2002, 2003, and 2004, the years that

followed Special Agent Lalli's May 2002 advice of rights.

D.

As for sentencing errors, Snipes first claims that the district court erred in sentencing him pursuant to U.S.S.G. § 2T1.1. According to Snipes, Section 2T1.1 is invalid because it (1) violates Title 28 U.S.C. § 994(j)'s prescription that a misdemeanor be treated as a less serious offense; (2) creates unwarranted disparity in contravention of 28 U.S.C. § 991(b)(1)(B); and (3) is not the product of careful empirical evidence.

We review this legal claim *de novo*. *United States v. Ndiaye*, 434 F.3d 1270, 1280 (11th Cir. 2006). Section 994(j) provides, "[t]he Commission shall insure that the guidelines reflect the general appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender who has not been convicted of a crime of violence *or an otherwise serious offense*." 28 U.S.C. § 994(j) (emphasis added). Snipes argues that a 26 U.S.C. § 7203 misdemeanor offense is a less serious offense for which *no* first-time offender should be awarded jail time.

Section 2T1.1 (the Sentencing Guideline for willful failure to file returns) directs the district court to calculate the offense level for the advisory guideline range with the use of the Tax Table (§ 2T4.1) that measures the tax loss and an assessment of specific offense characteristics. Section 2T1.1 embodies a change from pre-guidelines sentencing practice. Although under [sic]

"[u]nder pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, . . . [§ 2T1.1] is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length." U.S.S.G. § 2T1.1 comment. (backg'd).

As for seriousness, Snipes's argument that § 2T1.1 conflicts with § 994(j) misapprehends the structure of the Sentencing Guidelines. Section 2T1.1 works in concert with other sections of the Guidelines to allow an award of probation to first-time offenders who committed less serious offenses. Principally, § 2T4.1 allows a district court to measure the tax loss and pin the offense level to that loss. The table found in § 2T4.1 assigns a modest offense level of 6 to tax losses of $2,000 or less and, not surprisingly, increases the offense level as the tax loss increases. Thus, a defendant who caused a tax loss of more than $400,000,000 or more [sic] would receive an offense level of 36. If the tax loss were not serious, a first time offender might well be assigned an offense level for which probation would be appropriate. Similarly, § 4A1.1 allows the district court to assess the defendant's criminal history; less serious criminal histories mitigate § 2T1.1's reach.

This graduated penalty structure reflects the Sentencing Commission's assessment that a "greater tax loss is obviously more harmful to the treasury and more serious than a smaller one with otherwise similar characteristics." U.S.S.G. § 2T1.1, comment. (backg'd). Thus, the Commission complied fully with

§ 994(j) by ensuring that the tax offense "guidelines reflect the general appropriateness of imposing a sentence other than imprisonment" for first time offenders who have committed less serious crimes. 28 U.S.C. § 994(j). If the defendant's crime were not "serious" because the tax loss was minor and if his criminal history so warranted, the guidelines would advise a sentence of probation. In contrast, if the tax loss were high and thus more "serious" and "harmful to the treasury," as it was in this case, the guidelines would advise a longer sentence. Snipes merely disputes Congress's and the Commission's assessment of major tax losses as serious. We are unpersuaded.

Snipes's challenge to Section 2T1.1 on disparity grounds is also unsuccessful. Snipes claims that "[b]y treating misdemeanors the same as felonies, the tax guidelines violate" 28 U.S.C. § 991(b)(1)(B). Yet Congress was concerned about the disparity of sentences "among defendants with similar records who have been found guilty of similar criminal conduct," not between misdemeanants and felons. *Id.* The district court noted that misdemeanants who, like Snipes, had willfully failed to file their personal income tax returns had engaged in similar behavior to the felons who had received similar sentences. The guideline does not create disparity of the kind that would violate 28 U.S.C. § 991(b)(1)(B).

Finally, Snipes's claim that § 2T1.1 is not the product of careful empirical evidence is also incorrect. To begin with, the absence of empirical evidence is not an independent ground that compels the invalidation

of a guideline. In *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007), the Supreme Court disapproved of the crack cocaine guideline in part because it was not based on empirical evidence, but the Court did not invalidate the guideline. *Id.* at 96, 109-10, 128 S.Ct. 558. Instead, the Supreme Court held that the lack of empirical evidence was one factor that a district court could consider in exercising its post-*Booker* right to *depart* from the guidelines. *Id.* at 109-10, 128 S.Ct. 558. The lack of empirical evidence would not require the wholesale invalidation of sentencing guidelines.

Further, although Snipes correctly notes that the revised Guidelines reflect a change from pre-Guideline sentencing procedures, U.S.S.G. § 2T1.1 comment, (backg'd), that does not mean that the Commission performed no empirical analysis when it increased sentences for tax offenses. According to the Sentencing Commission, Section 2T1.1 was created after empirical analysis of sentences for white-collar crimes. The Commission compared sentences for tax crimes and other white-collar crimes, such as embezzlement, with similar crimes, such as larceny, and discovered that the white-collar crimes were given "considerably lower" sentences. U.S. Sentencing Comm'n, *Supplementary Report On the Initial Sentencing Guidelines and Policy Statements* 18 (1987). The change to increase sentences for offenders who had caused major tax losses was adopted "[i]n light of the legislative history supporting higher sentences for white-collar crime." *Id.* (citing S.Rep. No. 225, 98th

Cong., 1st Sess., 177 (1983)). Thus, Snipes's suggestion that Section 2T1.1 was not based on empirical evidence is unavailing.

The district court did not err in applying U.S.S.G § 2T1.1 to Snipes's crimes.

E.

Snipes says next that the district court erred in imposing a two-level enhancement under U.S.S.G. § 3C1.1 for obstruction of justice. The enhancement was based on Snipes's instruction to Amen RA employee Carmen Baker not to respond to a grand jury subpoena. Snipes warned her that she would have to "pay the consequences" if she cooperated with the federal tax investigation. Snipes argues that because the subpoena was never entered into evidence, the government did not prove that the subpoena actually related to the charges in the indictment. Snipes also benignly characterizes the phrase "pay the consequences" as a reference to potential legal action that Baker might face for breach of a confidentiality agreement.

We review a district court's factual finding of obstruction of justice for clear error. *United States v. Massey*, 443 F.3d 814, 818 (11th Cir. 2006). The application of U.S.S.G. § 3C1.1 to those factual findings is reviewed *de novo*. *Id.*

The district court did not clearly err in finding the evidence was sufficient to establish that the

subpoena was related to the charged tax offenses. Although the grand jury subpoena was never placed into evidence, it is undisputed that the subpoena was delivered by the investigating IRS agent to a former employee of Snipes's film company, Amen RA, in an attempt to obtain records about Amen RA. And Baker testified that Snipes "told [her] not to respond, not to talk to anybody or to disclose any information on the company." The context of the subpoena's delivery, Baker's response, and Snipes's comments were sufficient to allow the trial court to determine that the subpoena was related to the tax investigation.

The district court also did not err in finding that Snipes's instruction to Baker to refuse to comply with the subpoena and his threat that "if you do contact them, you will have to pay the consequences" constituted obstruction of justice. We have long held that encouraging another person to avoid complying with a grand jury subpoena may be considered to be obstruction. *United States v. Rudisill,* 187 F.3d 1260, 1263-64 (11th Cir. 1999) (upholding obstruction enhancement where the defendant encouraged a witness to flee instead of complying with a grand jury subpoena); *United States v. Garcia,* 13 F.3d 1464, 1471 (11th Cir. 1994) (upholding obstruction enhancement where the defendant brought a witness into a walk-in freezer and asked him not to speak with the FBI). The commentary to the Guidelines describes this kind of conduct as amounting to obstruction: "(a) threatening, intimidating, or otherwise unlawfully influencing a . . . witness, . . . directly or indirectly, or attempting

to do so"; and (d) "directing or procuring another person to destroy or conceal evidence that is material to an official investigation." U.S.S.G. § 3C1.1 comment. (n.4(a) and (d)). The application of this Guideline was not legal error.[8]

F.

Finally, we address whether Snipes's thirty-six month prison sentence was unreasonable because the district court allegedly placed undue reliance on general deterrence as a sentencing factor under 18 U.S.C. § 3553(a). Snipes insists that the only reasonable sentence for his failure to file convictions would have been a period of probation.

In reviewing reasonableness, we begin by examining the procedural reasonableness of a sentence, ensuring "that the district court committed no significant procedural error, such as failing to calculate

---

[8] Snipes also argues that, under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the district court erred in sentencing because the jury made no findings about either the extent of the tax loss or obstruction of justice. *Apprendi* held that, other than the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S.Ct. 2348. However, "the use of extra-verdict enhancements in a non-mandatory guidelines system is not unconstitutional." *United States v. Rodriguez*, 398 F.3d 1291, 1300 (11th Cir. 2005). Since the district court correctly observed that the guidelines were purely advisory, *Apprendi* does not apply to this case.

(or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence." *United States v. Pugh*, 515 F.3d 1179, 1190 (11th Cir. 2008) (quoting *Gall v. United States*, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). Under *Gall*, the sentencing judge must "consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." *Gall*, 552 U.S. at 49-50, 128 S.Ct. 586. "[A] district court's unjustified reliance on any one Section 3553(a) factor may be a symptom of an unreasonable sentence," *Pugh*, 515 F.3d at 1191, although attaching great weight to any one factor does "not necessarily make a sentence unreasonable." *Id.* at 1192.

Here, the district court carefully complied with the sentencing procedures. The judge conducted an extensive sentencing hearing and listened to Snipes's allocution, several character witnesses, and argument about sentencing. The court correctly calculated the guideline range and, again, noted that the guidelines were advisory. The sentencing transcript reveals that the judge weighed each factor embodied in the Section 3553(a) calculus before pronouncing the sentence, which was within the recommended guideline range. The sentence was not procedurally unreasonable.

Next, we "consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id.* at 1190 (quoting *Gall*, 552 U.S. at 51, 128 S.Ct. 586). "[W]e will not second guess

the weight (or lack thereof) that the judge accorded to a given factor . . . [under § 3553(a)], as long as the sentence ultimately imposed is reasonable in light of *all* the circumstances presented." *Id.* at 1191 (citation and quotation marks omitted). The party challenging a sentence has the burden of establishing that it was unreasonable. *United States v. Talley,* 431 F.3d 784, 788 (11th Cir. 2005).

The district court gave ample consideration to each of the relevant considerations found in 3553(a). Although the discussion about general deterrence was somewhat longer than the discussion of the other factors, its length corresponds with the emphasis the Sentencing Guidelines placed on deterrence in the criminal tax context. The introductory commentary to the Tax section of the Sentencing Guidelines explains that

> [b]ecause of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a *primary consideration* underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.

U.S.S.G. Ch. 2 Pt. T, intro. Comment (emphasis added).

Moreover, "[w]hen the district court imposes a sentence within the advisory Guidelines range, we

ordinarily will expect that choice to be a reasonable one." *Talley,* 431 F.3d at 788. *See also Rita v. United States,* 551 U.S. 338, 347, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). Although Snipes argues that there were mitigating factors that the judge did not specifically mention at sentencing, these facts – his college education, his family, and his charitable activities – do not compel the conclusion that the sentence crafted in accordance with the 18 U.S.C. § 3553(a) factors was substantively unreasonable. The district court acted well within its considerable discretion in sentencing Snipes to thirty-six months in prison.

AFFIRMED.

## APPENDIX B

2007 WL 2572198

**United States District Court,**
**M.D. Florida, Ocala Division.**

UNITED STATES of America

v.

Wesley Trent SNIPES.

No. 5:06-cr-22-Oc-10GRJ.
Sept. 5, 2007.

James R. Klindt, John Sciortino, M. Scotland Morris, U.S. Attorney's Office, Jacksonville, FL, Jeffrey A. McLellan, U.S. Department of Justice, Washington, DC, Robert E. O'Neill, U.S. Attorney's Office, Tampa, FL, for United States of America.

Daniel R. Meachum, Daniel R. Meachum & Assoc., LLC, Atlanta, GA, Donald I. Bierman, Bierman, Shohat, Loewy & Pizzi, P.A., Miami, FL, William R. Martin, Blank Rome, LLP, Washington, DC, Wesley Trent Snipes.

### *ORDER ON MOTIONS*

WM. TERRELL HODGES, United States District Judge.

Defendant Snipes has filed three motions: (1) a Motion to Dismiss All Counts in the Indictment, (Doc. 145); (2) a Motion to Sever And To Continue the Trial Date, (Doc. 148); and (3) a Motion For a Change of Venue, (Doc. 144). The Government has filed responses

in opposition to all three motions. (Docs. 176, 178, and 175).

Upon due consideration, each of the motions is without merit and will be Denied.[1]

The Superseding Indictment is framed in eight counts and names three Defendants: Wesley Trent Snipes, Eddie Ray Kahn, and Douglas P. Rosile.[2]

Count One alleges a conspiracy among and between the three Defendants to defraud the Government in violation of 18 U.S.C. § 371. The specific object of the conspiracy offense is alleged to have been the frustration of the Internal Revenue Service ("IRS") in its attempt to collect income taxes owed by Defendant Snipes for the tax years 1999 through 2005.

Count Two alleges an offense in violation of the false claims statute, 18 U.S.C. § 287. It charges that all three Defendants, on or about April 11, 2001, aided and abetted each other in the filing of an amended income tax return for Defendant Snipes relating to the tax year 1997 and falsely claiming a refund of more than $7.3 million dollars.

Counts Three through Eight are brought against Defendant Snipes alone, charging offenses in violation of 26 U.S.C. § 7203, namely, that he failed to file

---

[1] The Court previously addressed Defendant Snipes' request to continue trial, and has scheduled trial to commence on Monday, October 22, 2007. (Doc. 186).

[2] *See* Doc. 6.

income tax returns for the tax years 2000 through 2005, each year constituting a separate count.

## *THE MOTION TO DISMISS*

### *1. Count One – The Conspiracy Charge*

Defendant Snipes argues that Count One, the conspiracy charge, fails to state an offense because it does not allege all of the essential elements of the crime defined by 18 U.S.C. § 371. He is, quite simply, mistaken.

The statute proscribes two distinct types of conspiracy offenses: (1) a conspiracy to commit some substantive offense violative of federal criminal law; and (2) a conspiracy to defraud the United States or one of its governmental agencies. 18 U.S.C. § 371. Here, the grand jury elected to charge the Defendants with a conspiracy offense in the second statutory category – a conspiracy to defraud the IRS, a governmental agency.

The essential elements of the offense of conspiring to defraud the United States are: (1) an agreement between two or more people to defraud the Government; (2) the Defendants' knowing and willful joinder and participation in that agreement; and (3) the commission of an overt act by one of the conspirators in furtherance of the conspiracy. *United States v. Adkinson*, 158 F.3d 1147, 1153-54 (11th Cir. 1998); *United States v. Suba*, 132 F.3d 662, 672 (11th Cir. 1998); *see also United States v. Klein*, 247

F.2d 908 (2d Cir. 1957). The Superseding Indictment clearly tracks the language of the statute and plainly alleges each of these elements; and, under the law of this Circuit, that is enough. *See United States v. Ndiaye*, 434 F.3d 1270, 1299 (11th Cir. 2006) (holding that "an indictment that tracks the wording of the statute, as long as the language sets forth the essential elements of the crime," is sufficient and must be upheld); *United States v. Bobo*, 344 F.3d 1076, 1083 (11th Cir. 2003) ("For an indictment to be valid, it must contain the elements of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet."); *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992) ("The indictment is sufficient if it charges in the language of the statute.") *See also Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962).

The balance of Defendant Snipes' arguments about the insufficiency of Count One are made in anticipation of what the evidence will show (or not show) at trial, and such arguments cannot properly be considered in deciding a pretrial motion to dismiss. *See United States v. Sampson*, 371 U.S. 75, 78-79, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962); *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 33, n. 2, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); *Critzer*, 951 F.2d at 307-08, (11th Cir. 1992); *United States v. Cadillac Overall Supply Co.*, 568 F.2d 1078, 1082 (5th Cir. 1978).

The motion to dismiss Count One, the conspiracy charge, will be Denied.

*II. Count Two – The False Claim Offense*

The argument here is that Count Two cannot stand since the focus of the charge – Defendant Snipes' amended income tax return for 1997 – did not purport to be a valid claim because it was not signed under penalty of perjury. In fact, he says, the return was altered to state that it was signed "under no penalties of perjury."

Apart from the fact that this argument also anticipates the evidence and would require the Court to improperly look beyond the face of the Superseding Indictment, there is no persuasive authority for the Defendant's position.[3] To the contrary, the law weighs in favor of permitting this charge to stand. *See United States v. Neifert-White Co.*, 390 U.S. 228, 233, 88 S.Ct. 959, 19 L.Ed.2d 1061 (1968) ("This remedial statute [the False Claims Act] reaches beyond 'claims' which might be legally enforced, to all fraudulent attempts to cause the government to pay out sums of money."); *quoted in United States v. Killough*, 848

---

[3] Defendant Snipes cites to an IRS Revenue Ruling and an unpublished decision from another jurisdiction in support of his position that the Form 1040X in this case cannot form the basis of a false or fraudulent claim under § 287. *See* Rev. Rul.2005-18; *Letscher v. United States*, No. 99 Civ. 2602 (NRB), 2000 WL 1290864 (S.D.N.Y. Sept. 11, 2000). Both address the validity of tax returns *for purposes of obtaining an income tax refund under the Internal Revenue Code*. Neither the Revenue Ruling nor the unpublished decision involve any criminal charges under 18 U.S.C. § 287, and they do not construe or apply that statute in any way.

F.2d 1523, 1533 (11th Cir. 1988). At least one other Circuit Court of Appeals has affirmed a § 287 conviction under strikingly similar circumstances. *See United States v. Nash*, 175 F.3d 429 (6th Cir. 1999) (affirming conviction under § 287 for filing Non-resident Alien Income Tax Returns signed "with all rights reserved, without prejudice" and labeled as "Revocation of Election/Claim of Refund").

Defendant Snipes' motion to dismiss Count Two will be Denied.[4]

*III. Counts Three Through Eight – Failure to File Returns*

Defendant Snipes moves to dismiss these counts on two grounds: (1) that he satisfied the filing requirements when he submitted to the IRS in 2004 certain statements in affidavit form; and (2) that he is a victim of selective prosecution for constitutionally impermissible reasons.

With respect to the first of these contentions, the Court cannot consider the 2004 filings in deciding a motion to dismiss. Under the Federal Rules of

---

[4] The Defendant also uses this same theory to argue that Count Two of the Superseding Indictment does not allege the existence of a valid claim, and therefore must be dismissed for failure to allege all elements of the charge. This argument fails for the same reason as the first theory. There is no requirement that any claims which form the basis of a criminal charge under 18 U.S.C. § 287 must be valid and enforceable.

Criminal Procedure and clearly established decisional law, the Court is precluded from "piercing" the Superseding Indictment and engaging in a pretrial determination of the sufficiency of the evidence. *United States v. Sampson, supra,* 371 U.S. 75, 78-79, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962); *United States v. Critzer, supra,* 951 F.2d 306, 307 (11th Cir. 1992).

With respect to the argument about selective prosecution, the Defendant contends that the Government has initiated and pursued the failure to file counts (1) because of his race (African-American); (2) because he exercised his right to counsel; and (3) because he exercised his right to free speech, all in violation of his Fifth, Sixth, and First Amendment rights, respectively.

The essence of the job of any prosecutor – the awesome discretionary power of the position – is to decide who will be prosecuted and what offense will be charged. In a very real way, every criminal case represents a selective prosecution. Necessarily, therefore, even though a particular defendant may appear to be one of many similarly situated offenders who have not ben [sic] charged, the courts in such cases have no right (and wholly insufficient resources) to infringe upon the executive branch authority of the prosecutor and inquire into the reasons why one person was charged and another was not. The Supreme Court has declared that an indictment may be dismissed as an improper "selective prosecution" only where there

is "clear evidence" that the prosecution is motivated by a constitutionally impermissible reason.[5] *See United States v. Armstrong*, 517 U.S. 456, 463-64, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996); *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15, 47 S.Ct. 1, 71 L.Ed. 131 (1926). The stringency of this burden is perhaps best illustrated by the fact that, despite frequent mention in the cases of the concept of "selective prosecutions," only two decisions can be found in which an indictment has actually been dismissed for that reason. *See United States v. Correa-Gomez*, 160 F.Supp.2d 748 (E.D.Ky. 2001), *aff'd*, 328 F.3d 297 (6th Cir. 2003); *United States v. McDonald*, 553 F.Supp. 1003 (S.D.Tex. 1983).

Defendant Snipes' effort to show racial prejudice in his prosecution is limited to the factual allegation that the Government is well-aware that co-Defendant Kahn, who is Caucasian, has not filed any income tax returns for the tax years 1997-2002, yet the Government has chosen not to charge Kahn with willful failure to file. According to Defendant Snipes, the Government's refusal to charge Kahn, while focusing solely on Defendant Snipes, demonstrates that prosecuting him for failure to file has a discriminatory effect, and was motivated by a discriminatory purpose. This *non sequitur* is a far cry from clear and

---

[5] The Eleventh Circuit has interpreted this "clear evidence" standard to require "clear and convincing evidence" of selective prosecution. *United States v. Smith*, 231 F.3d 800, 808 (11th Cir. 2000).

convincing evidence of unconstitutional motivation,[6] especially where the record clearly shows that Defendants Snipes and Kahn are not similarly situated persons.

From a prosecutor's point of view, especially in tax cases, the primary objective in deciding whom to prosecute is to achieve general deterrence. Here, Defendant Snipes is admittedly a well known movie star, and a person of apparent wealth, whose prosecution has already attracted considerable publicity. By contrast, the Defendant Eddie Ray Kahn does not appear to share Defendant Snipe's [sic] notoriety. "Since the government lacks the means to investigate and prosecute every suspected violation of the tax laws, it makes good sense to prosecute those who will receive, or are likely to receive, the attention of the media." *United States v. Catlett*, 584 F.2d 864, 868 (8th Cir. 1978) (internal citations omitted); *see also United States v. Hastings*, 126 F.3d 310, 314 (4th Cir. 1997) (no selective prosecution in case against prominent businessman and Republican party leader charged with failure to file income tax returns).

The Court also finds that Defendant Snipes has failed to meet his burden of providing "a credible

---

[6] Defendant Snipes' argument is also insufficient to justify discovery proceedings concerning this issue. The Supreme Court has held that "justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim." *Armstrong, supra*, 517 U.S. at 468.

showing of different treatment of similarly situated persons"[7] with respect to the other clients of Defendant Eddie Ray Kahn's organizations: American Rights Litigators ("ARL") and Guiding Light of God Ministries ("GLGM"). To begin with, Defendant Snipes has not identified the race or ethnicity of any of these approximately 2000 clients, nor has he even established that they did not file income tax returns. Instead, Defendant Snipes relies solely upon supposition that these clients have engaged in similar conduct, and he makes no showing that any of the other clients are among the rich and famous whose prosecution would achieve the same general deterrent effect.[8]

The motion to dismiss or for discovery on the ground of selective prosecution based on race will be Denied.[9]

---

[7] *Armstrong*, 517 U.S. at 470.

[8] The fact that Defendant Snipes has been in possession of ARL's entire client list for some time and yet has been unable to present anything more than speculation further weakens his argument. *See Armstrong*, 517 U.S. at 470 ("if the claim of selective prosecution were well founded, it should not have been an insuperable task to prove that persons of other races were being treated differently than [defendants].").

[9] To the extent Defendant Snipes argues that he is being subjected to an impermissible prosecution due to exercising his right to counsel and/or engaging in free speech, his "evidence" is even weaker and requires no further discussion. The motion to dismiss and/or for discovery on those grounds will be Denied.

## *THE MOTION TO SEVER*

Defendant Snipes has moved, pursuant to Fed. Rule Crim. P. 14, for an order severing his trial from that of his co-Defendants on three grounds: (1) that "the defenses in this case will be antagonistic to each other;"[10] (2) that the "spillover effect" of the evidence presented against co-Defendants Kahn and Rosile will prejudice Defendant Snipes' right to a fair trial; and (3) that the anticipated trial conduct of co-Defendant Kahn, who is proceeding *pro se,* will also prejudice Defendant Snipes' right to a fair trial.

The motion to sever is due to be denied because it anticipates developments at trial. Moreover, it does not appear that the grounds as presently stated are sufficient to require a severance in any event. It is not enough that counsel is concerned that the defenses will be antagonistic; they must be mutually exclusive before a severance is to be justified on those grounds. That is, in order to believe the defense of one defendant, the jury must necessarily disbelieve the defense of the other defendant. *United States v. Garcia,* 405 F.3d 1260, 1272 (11th Cir. 2005); *see also United States v. Farrell,* 877 F.2d 870, 876-77 (11th Cir. 1989) ("Specifically, the essence or core of the defenses must be in conflict, such that the jury, in order to believe the core of one defense, must necessarily disbelieve the core of the other."). The mere fact that co-defendants all testify and each gives damaging testimony against

---

[10] Motion to Sever at 1. (Doc. 148).

the other does not, standing alone, establish mutually inconsistent defenses. *Zafiro v. United States,* 506 U.S. 534, 540, 113 S.Ct. 933, 122 L.Ed.2d 317 (1993).

With respect to the arguments about "spillover effect" and expected misconduct by another Defendant, those are matters that the Court can and should deal with at trial by excluding inadmissible evidence, giving limiting instructions to the jury, and regulating the conduct of all parties. *See United States v. Blankenship,* 382 F.3d 1110, 1123 (11th Cir. 2004); *United States v. Schlei,* 122 F.3d 944, 984 (11th Cir. 1997); *United States v. Knowles,* 66 F.3d 1146, 1160 (11th Cir. 1995); *United States v. Veteto,* 701 F.2d 136, 138-39 (11th Cir. 1983).

The motion to sever will be Denied without prejudice to renewal at trial if sufficient grounds arise.

***MOTION FOR A CHANGE OF VENUE***

Defendant Snipes next requests, pursuant to 18 U.S.C. § 3237(b) and Federal Rule of Criminal Procedure 21(b), that venue of his case be transferred to the United States District Court for the Southern District of New York. While admitting that venue is appropriate in this district for the conspiracy and false claim charges (Counts I and II) the Defendant contends that venue is also appropriate in New York, California and Massachusetts, and that his case should be transferred to New York for the convenience of the parties and witnesses, as well as in the interests of justice. Defendant Snipes further argues

that the Southern District of New York is the only district which has venue over his six failure to file charges (Counts III through VIII) and that he is electing to have those counts tried in New York pursuant to 18 U.S.C. § 3237(b).

*I. Venue Over the Failure to File Charges*

The Government has charged Defendant Snipes with six failure to file counts under 26 U.S.C. § 7203. Congress has prescribed that venue is appropriate for such charges "in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). However, a defendant "may elect to be tried in the district in which he was residing at the time the alleged offense was committed," if and only if the defendant files a motion stating such an election "within twenty days after arraignment of the defendant upon indictment or information." 18 U.S.C. § 3237(b). The Defendant attempts to make this election in his present motion to change venue, and requests that the failure to file charges against him be tried in the Southern District of New York because he was a resident of New York at the time he allegedly failed to file his tax returns.

Defendant Snipes was arraigned before the Magistrate Judge on December 8, 2006. Therefore, in order to make a timely election under § 3237(b), he had to file his motion with the Court on or before

December 29, 2006.[11] However, Defendant Snipes did not make his motion until June 4, 2007, over five months after the election period expired. The Defendant attempts to excuse his tardiness by pointing to the Magistrate Judge's Orders extending the deadlines for filing motions in the case.[12] However, Defendant Snipes did not request an extension of the motions deadline until January 12, 2007,[13] and the Magistrate Judge's original Order extending the motions deadline was not entered until January 16, 2007, well after the expiration of the § 3237(b) election period. Moreover, the Order does not address § 3237(b) in any way. Accordingly, the Court cannot find that Defendant Snipes' election under 3237(b) is timely.[14]

Defendant Snipes also argues that venue of the failure to file charges is not appropriate in this Court because the alleged offenses were not begun, continued, or completed in Florida. *See* 18 U.S.C. § 3237(a). Both sides agree that venue for a failure to file charge under § 7203 lies both in the judicial district of the

---

[11] *See* Fed.R.Crim.P. 45(a).

[12] *See* Docs. 85, 134.

[13] *See* Doc. 72.

[14] The Court also finds that Defendant Snipes never filed a specific request to extend the § 3237(b) filing deadline, or even mentioned this statute in any of his other motions. Even if he had made such a request, the Court would be unable to grant it. *Cf. Bowles v. Russell*, __ U.S. ___, 127 S.Ct. 2360, 168 L.Ed.2d 96 (June 14, 2007); *United States v. Humphreys*, 982 F.2d 254 (8th Cir. 1992); *Abrams v. McGohey*, 260 F.2d 892 (2d Cir. 1958).

defendant's legal residence and in the judicial district of the applicable IRS Service Center where the income tax returns should have been filed. *See United States v. Clinton,* 574 F.2d 464 (9th Cir. 1978); *United States v. Calhoun,* 566 F.2d 969 (5th Cir. 1978);[15] 26 U.S.C. §§ 6091(b)(1)(A)(i), (ii). Although the superseding indictment alleges that Defendant Snipes was a resident of Windermere in Orange County, Florida during the relevant time period, Defendant Snipes insists that he was a resident of New York City, New York, and that his previous income tax returns were mailed to the IRS Service Center in Andover, Massachusetts.

It is clear, therefore, that the question of residency, and thus appropriate venue, is a disputed issue of fact. Such disputed issues of fact must be submitted to the jury under a preponderance of the evidence standard of proof. *See United States v. Stickle,* 454 F.3d 1265, 1271-72 (11th Cir. 2006); *United States v. Breitweiser,* 357 F.3d 1249, 1253 (11th Cir. 2004); *United States v. Stitzer,* 785 F.2d 1506, 1518-20 (11th Cir. 1986); *United States v. Males,* 715 F.2d 568 (11th Cir. 1983).

Defendant Snipes' motion to change venue with respect to the failure to file charges will therefore be Denied.

---

[15] All decisions issued by the Fifth Circuit prior to October 1, 1981 are binding precedent in this Circuit. *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

*II. Venue Concerning the Conspiracy and False Claim Charges*

Defendant Snipes contends that venue is appropriate for his conspiracy charge in New York, California, and Florida because some of the alleged overt acts committed in furtherance of the conspiracy took place in all three states.[16] He contends that venue for his false claim charge is appropriate in New York, Florida, and Massachusetts because the income tax refund form was received at the IRS Service Center in Andover, Massachusetts, and because it is reasonable to believe that some of the acts underlying the preparation and filing of the form took place in New York.[17] Finally, as already discussed, Defendant Snipes contends that venue is appropriate for the failure to file charges in New York alone.[18] Given these "facts," he argues that the only district which has venue over all of the alleged offenses is the Southern District of New York. Because the Court has already determined that the question of proper venue for the failure to file charges must be decided by the jury, and because Defendant Snipes does not refute that venue concerning the other counts is appropriate in Florida, the Court does not find these arguments persuasive.[19]

---

[16] *See* Motion to Change Venue at 6-7. (Doc. 144).

[17] *Id.* at 7-8.

[18] *Id.* at 9-10.

[19] Conspiracy charges may be prosecuted in the district where the conspiracy was formed or in any district where an

(Continued on following page)

Defendant Snipes next argues that venue should be transferred to New York pursuant to Federal Rule of Criminal Procedure 21(b), which provides that "the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties and witnesses and in the interest of justice." The burden is on the moving Defendant to justify the transfer; and, in particular, he must demonstrate a substantial imbalance of inconvenience to himself. *United States v. Stickle*, 355 F.Supp.2d 1317, 1321 (S.D.Fla. 2004).

The United States Supreme Court has provided guidance in the form of several factors the Court may consider in evaluating a motion for change of venue, such as: (1) the location of the defendants; (2) the location of possible witnesses; (3) the location of events likely to be at issue; (4) the location of documents and records likely to be involved; (5) the potential disruption of a defendant's business; (6) expenses to the parties; (7) location of counsel; (8) relative accessibility of the place of trial; (9) the docket condition of each district involved; and (10) any other special factors which might affect transfer. *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 243-44, 84 S.Ct. 769, 11 L.Ed.2d 674 (1964). Defendant Snipes contends that a

---

overt act was committed in furtherance of the conspiracy. *Schlei*, 122 F.3d at 975. Venue for false claim charges lies in either the district where the claim was prepared, mailed or presented to the Government. *United States v. Wuagneux*, 683 F.2d 1343, 1356 (11th Cir. 1982).

change of venue to the Southern District of New York is appropriate under eight of these factors.[20]

*A. Location of Defendant, Expense to the Parties, and Unusual Factors*

The Defendant's argument as to these three factors rests solely on his assertion that he owns homes in both New York and California, and that his wife and four young children are now living at his home in California. According to Defendant Snipes, if venue remains with this Court, his wife and young children will not be able to travel to Florida for the trial, which is projected to last approximately one month. Therefore, if the trial is held in this district, Defendant Snipes claims he will be forced to pay for lodging for the duration of his trial, he will have to rent office and storage space for his legal counsel, and he will have to pay to fly home every weekend to see his family.

Putting aside for the moment that Defendant Snipes does not, in fact, reside in New York at this

---

[20] The Defendant does not argue that conducting a month-long trial in Florida as opposed to New York would unduly disrupt his professional career. He also does not argue that docket conditions support a transfer to the Southern District of New York. The Government, however, argues that docket conditions in the Southern District of New York, which is congested in comparison to the Middle District of Florida, weigh in favor of keeping the case here.

time,[21] "[a] criminal defendant has no right to be tried in the place of his domicile, . . . , and the defendant's concerns about being tried away from home are ordinarily of little relevance to a motion for a change of venue." *United States v. Bagnell*, 679 F.2d 826, 832 (11th Cir. 1982); *see also United States v. Walker*, 559 F.2d 365, 372 (5th Cir. 1977); *United States v. McMahan*, Case No. 8:04-CR-348-T-24 TGW, 2006 WL 224027, at * 1 (M.D.Fla. Jan. 30, 2006). The Court is therefore unswayed by Defendant Snipes' contention that he will bear significant travel, lodging, and/or additional legal expenses, particularly in light of the fact that he is an affluent individual who travels frequently,[22] and he has a residence in Orange County which is within reasonable driving distance from the Court. Defendant Snipes' argument on this point is equally unpersuasive because it fails to account for the fact that if his trial is moved to New York as he requests, he would continue to incur the same travel expenses flying back and forth from New York to

---

[21] At the time of his arraignment, Defendant Snipes asserted, through counsel, that his place of residence is Marina Del Rey, California, and that is where the Magistrate Judge directed Defendant Snipes to reside until trial. (Doc. 60).

[22] Since his arraignment, Defendant Snipes was granted leave to travel to Namibia for approximately four weeks to complete production of a motion picture. (Doc. 60). On August 3, 2007, Defendant Snipes requested leave to travel to Vancouver, Canada for a period of at least six weeks in order to film another motion picture. (Doc. 181). Given Defendant Snipes' requests to travel out of the country for lengthy periods of time, his claims of undue hardship relating to travel ring hollow.

California to visit his wife and children.[23] Lastly, absent an unwarranted severance resulting in two costly trials, Defendant Snipes completely ignores the undue hardship that a transfer of this case to New York would place on his co-Defendants, both of whom have resided in and have strong ties to Florida and appear to lack substantial financial resources to defray the expenses of a lengthy trial in New York.

*B. Location of Witnesses*

Defendant Snipes next argues that a critical part of his defense will involve the testimony of several witnesses who are located in New York. In particular, he intends to call his former tax advisors, whose offices are in New York City, as well as numerous character witnesses in the arts and film industry, who reside primarily in New York and New Jersey. According to Defendant Snipes, many of these character witnesses work for production companies in New York, and their participation in his trial will result in a hardship both to the witnesses themselves as well as to the entire production crew for the projects in which they are currently involved. Defendant Snipes does not, however, suggest that these witnesses would not be available for trial if venue is not transferred.

---

[23] While Defendant Snipes does not specify where his family expects to reside during his trial, it is presumed that if they are unable to travel to Florida, they are equally unable to travel to New York City.

In any event, the magnitude of this issue is not nearly as large as Defendant Snipes paints it to be. Because of the very narrow scope of their testimony, which quickly becomes cumulative, it has been the uniform practice of this Court for many years, applying Federal Rules of Evidence 403 and 611(a), to limit the number of character witnesses appearing for the accused under Federal Rule of Evidence 404(a)(1) to three persons.[24] The distant location of such a limited number of witnesses making a brief appearance during a month long trial is, therefore, not a matter of great significance in deciding a motion for change of venue.[25] Indeed, it is likely that a change of venue would inconvenience more witnesses than it would accommodate because, the Government asserts, many of its witnesses are located in Florida.

---

[24] The Government is subject to the same limitation on rebuttal, and if the prosecution intends to call any character witnesses in its rebuttal case, the Court will consider the possibility of allowing greater latitude to the Defendant with respect to the number of such witnesses to be called during the presentation of his case.

[25] None of the decisions cited by Defendant Snipes on this point are persuasive. Aside from the fact that the majority are unpublished decisions, none are from this Circuit, and all of them involve cases where a majority of the witnesses – not just a majority of character witnesses – resided in other districts. *See e.g., United States v. Martino,* No. S1 00 CR 389(RCC), 2000 WL 1843233, at * 6 (S.D.N.Y. Dec. 14, 2000); *United States v. Ohran,* No. 99 CR, 142(JSM), 2000 WL 620217, at *3-4 (S.D.N.Y. May 12, 2000); *United States v. Russell,* 582 F.Supp. 660, 662-63 (D.C.N.Y. 1984).

*C. Location of the Majority of Events At Issue*

Defendant Snipes contends that at all periods of time relevant to his case he was a resident of New York City, and that any contact he had with co-Defendants Kahn and Rosile occurred either while he was at his home in New York, or working in California. Defendant Snipes' argument simply ignores the allegations of the superseding indictment that the majority of the events surrounding the conspiracy and false claim charges took place through ARL and GLGM, which were located and operated in Lake County, Florida. His argument also ignores the fact that his place of residency during the time in question is in dispute, and will most likely be resolved at trial. Thus, while the Government concedes that some events took place in both New York and California, Defendant Snipes has not demonstrated that a *majority* of the events took place anywhere outside of Florida.

*D. Location of Documents Likely to Be Used At Trial*

The Court does not fully understand Defendant Snipes' argument on this factor, particularly when he concedes that almost all of the documents likely to be used at trial are already located within this district. Apparently he believes that because the Government removed these documents from other locations and relocated them to Florida, the Government should be required to transport them to New York for trial. This argument disregards completely the other *Platt*

factors which weigh strongly in favor of keeping venue in this Court, and also disregards the fact that the bulk of the documents relating to his co-Defendants have always been located in Florida. What Defendant Snipes is correct about, however, is that the location of documents should not weigh heavily in favor of either side. As Defendant Snipes points out, many of the documents have been stored electronically and are thus easily transported. Given the conveniences of modern transportation and communication, consideration of the location of documents does not tip the balance in favor of either party.

*E. Location of Co-Lead Counsel and Accessibility of Courthouses*

The last two factors raised by Defendant Snipes revolve around purported logistical difficulties he and his legal team anticipate they will encounter if this case remains in Florida. "[I]t is indisputable that New York, which is home to two major international airports, and is easily accessible by car and train, is more accessible than Ocala, Florida."[26] Given this increased accessibility, Defendant Snipes contends that it will be easier for his attorneys, who are located in Washington D.C., Atlanta, Georgia, and Miami, Florida, to travel to New York City as opposed to Ocala.

---

[26] Motion to Change Venue at 15.

Upon reflection, the Court does not believe that the travel times for legal counsel and/or accessibility of courthouses is a factor that deserves much weight.[27] While the Ocala Courthouse is not located in the immediate vicinity of a major airport, it is within one hour and a half driving distance from two international airports, (Tampa and Orlando), and is within a 45 minute driving distance from Gainesville Regional Airport which has regular direct flights to and from Atlanta and Miami. As the Government points out, these driving times are only slightly longer and, on some occasions, may even be less, than the congested commute from New York airports to downtown Manhattan. While it may be that co-counsel Mr. Martin would have an easier commute from Washington D.C. to New York, it is not at all clear that his co-counsel located in Atlanta and Miami would have such leisurely travel. Moreover, Defendant Snipes has failed to account for the fact that three of the four Government attorneys assigned to this case reside within the Middle District of Florida, and that both of the IRS Special Agents are based in Florida. Accordingly, neither the location of Defendant Snipes' co-lead counsel nor the accessibility of courthouses weighs in favor of a transfer of venue.

---

[27] In fact, Defendant Snipes recognizes that the location of his legal counsel is generally afforded less weight than other *Platt* factors.

*F. Conclusion*

Having reviewed all of the arguments by Defendant Snipes and analyzed each of the *Platt* factors raised, the Court finds that the Defendant has not met his burden of demonstrating a substantial imbalance of inconvenience to himself. When Defendant Snipes [sic] motion is viewed in conjunction with this Circuit's strong policy favoring joint trials in conspiracy cases, the denial of Defendant Snipes' motion to sever, the convenience of most of the witnesses and defendants, and the fact that Defendant Snipes has failed to particularlize [sic] any real prejudice, it is clear that transfer to the Southern District of New York is not warranted.

***Conclusion***

Accordingly, upon due consideration, it is hereby ORDERED and ADJUDGED as follows:

(1) Defendant Wesley Trent Snipes' Motion to Dismiss All Counts In the Indictment, (Doc. 145) is DENIED;

(2) Defendant Wesley Trent Snipes' Motion to Sever, (Doc. 148), is DENIED; and

(3) Defendant Wesley Trent Snipes' Motion for a Change of Venue, (Doc. 144), is DENIED.

IT IS SO ORDERED.

DONE and ORDERED.

## APPENDIX C

2007 WL 5041892

**United States District Court,**
**M.D. Florida, Ocala Division.**
UNITED STATES of America
v.
Wesley Trent SNIPES,
Eddie Ray Kahn, Douglas P. Rosile.

No. 5:06-cr-22-Oc-10GRJ.
Dec. 24, 2007.

Eddie Ray Kahn, Tavares, FL, Michael William Nielsen, Dowdy & Nielsen, Winter Springs, FL, Douglas P. Rosile, Sarasota, FL, David Anthony Wilson, Law Office of David A. Wilson, Ocala, FL, for Wesley Trent Snipes, Eddie Ray Kahn, Douglas P. Rosile.

### *ORDER*

WM. TERRELL HODGES, District Judge.

The Court conducted a hearing on all pending motions on December 11, 2007, (Doc. 326). After carefully considering the arguments of all Parties, as well as all relevant motions papers, the Court makes the following rulings.

### *I. Motions of Defendant Wesley Trent Snipes*

Defendant Wesley Trent Snipes' Motion to Exclude Purported Expert Testimony of William C. Kerr, (Doc. 149), is GRANTED IN PART AND DENIED IN PART. The Court finds that Mr. Kerr is qualified to

testify as an expert with respect to the four "Bills of Exchange" signed by Defendant Snipes, and that, with one exception, his opinions are reliable. *See* Fed.R.Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *Kumho Tire Company Ltd., et al. v. Carmichael,* 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Mr. Kerr may provide expert testimony concerning the "Bills of Exchange" as described in the Parties' moving papers, but may not provide any testimony or render any conclusions to the effect that the "Bills of Exchange" were "created solely for the purpose of perpetrating fraud." As the Government concedes, any such conclusions by Mr. Kerr would constitute impermissible expert opinion concerning Defendant Snipes' mental state. *See* Fed.R.Evid. P. 704(b).

Defendant Snipes' Motion to Designate the Case as Complex, (Doc. 246), is DENIED AS MOOT. The Court has previously determined that this case is complex for purposes of the Speedy Trial Act. *See* Docs. 85, 186, 229. *See also* 18 U.S.C. § 3161(h)(8)(B)(ii).

Defendant Snipes' Motion to Bar All 404(b) Evidence Against Snipes From Trial, (Doc. 250) is premature and therefore DENIED WITHOUT PREJUDICE. The Court does not have the evidence at issue before it, and there is no record context in which to evaluate its admissibility. Defendant Snipes may state his objections at the appropriate time during trial, if and when the Government seeks to admit such evidence.

Defendant Snipes' Motion to Strike Surplusage, (Doc. 271), is DENIED WITHOUT PREJUDICE. As correctly stated by the Government, (Doc. 293), the proper procedure when faced with a motion to strike surplusage is to reserve ruling until the Court has heard all evidence that will establish the relevance (or irrelevance) of the allegedly surplus language. *See United States v. Awan,* 966 F.2d 1415, 1426 (11th Cir. 1992). Moreover, the Court has already created a redacted version of the Superseding Indictment to provide to the jury at the beginning of trial. This was previously approved by counsel for all Parties. (Doc. 216).

Defendant Snipes' Motion to Exclude the Government's Handwriting Expert Witnesses and Handwriting Exemplar From Trial, (Doc. 272), is DENIED. Defendant Snipes asserts that the Government engaged in prosecutorial misconduct during the grand jury proceedings by seeking enforcement of a grand jury subpoena compelling Defendant Snipes to provide an [sic] handwriting exemplar after the grand jury had returned the initial indictment. This argument fails, however, because it presupposes that the handwriting exemplar was relevant only to the § 287 charge in Count Two, yet it is clear that the handwriting exemplar was equally relevant to the additional charges in the Superseding Indictment – in particular the conspiracy charge – concerning which

an investigation was ongoing. Because the Government "may continue an investigation from which information relevant to a pending prosecution 'may be an incidental benefit'," *see United States v. Alred*, 144 F.3d 1405, 1413 (11th Cir. 1998) (internal citation omitted), and given the lack of any positive evidence of prosecutorial misconduct, the motion is due to be denied.

Defendant Snipes' Motion to Exclude the Government's Expert Witnesses From Trial for Untimely Disclosure, (Doc. 273), is DENIED AS MOOT. Defendant Snipes seeks to exclude Agent Combs as an expert witness on the grounds that the Government did not identify Agent Combs until several months after the Court's disclosure deadline. During the December 11, 2007 hearing, the Assistant United States Attorney stated that the Government no longer intends to call Agent Combs as a witness, unless and until an issue arises during trial requiring his individual expertise. Accordingly, the relief requested by Defendant Snipes is no longer necessary; however, Defendant Snipes may revisit this issue should the Government seek to call Agent Combs as an expert witness during trial.

Defendant Snipes' Motion in Limine to Preclude the Admission of Alleged Co-Conspirator Statements Absent a Pretrial Showing Under Federal Rule of Evidence 801(d)(2)(E) and Request for a *James* Hearing, (Doc. 274), is DENIED WITHOUT PREJUDICE. As Defendant Snipes correctly notes, a hearing pursuant to *United States v. James*, 590 F.2d 575, 579-80

(5th Cir. 1979), is not mandatory. *See United States v. Hasner,* 340 F.3d 1261, 1274-75 (11th Cir. 2003); *United States v. Van Hemelryk,* 945 F.2d 1493, 1498-99 (11th Cir. 1991). Any issue concerning Fed.R.Evid. 801(d)(2)(E) will be carried with the case and determined at trial when appropriate objections, if any, are made.

Defendant Snipes' Motion for Attorney Conducted Voir Dire and For Use of a Juror Questionnaire, (Doc. 275), is DENIED for the reasons stated by the Court during the December 11, 2007 hearing. (Doc. 328). The Parties may submit to the Court proposed voir dire questions at any time up to and including the time the jury is empaneled.

Defendant Snipes' Motion to Disclose Grand Jury Transcripts, (Doc. 276) and Motion to Unseal the Record For a Case Related to Underlying Grand Jury (Doc. 277) are DENIED. Defendant Snipes seeks disclosure of the entire grand jury transcript as well as the entire record of all grand jury proceedings relating to the issuance of the Superseding Indictment in this case in order to ascertain whether any prosecutorial misconduct took place during grand jury proceedings, and in particular, to verify what the Assistant United States Attorney represented to the United States District Judge with respect to the use of Snipes' handwriting exemplar. Defendant Snipes has not satisfied the standards for disclosure set forth in *Douglas Oil Co. of California v. Petrol Stops Northwest,* 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979). In particular, the Court finds the request

to be overly and unnecessarily broad – more in the nature of a "fishing expedition" – and that Defendant Snipes has not established any potential injustice or compelling need that would be [sic] require or justify disclosure of this information.[1] *See Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400, 79 S.Ct. 1237, 3 L.Ed.2d 1323 (1959) ("The burden . . . is on the defense to show that 'a particularized need' exists for the minutes which outweigh the policy of secrecy."). *See also* Fed.R.Crim.P. 6(e)(3)(E)(ii).

Defendant Snipes' Motion to Dismiss or Transfer Based on Racially Discriminatory Venue Selection, (Doc. 278), is DENIED. Notably, Defendant Snipes does not contend that venue is improper in this Court. In fact, during the December 11, 2007 hearing, counsel for Defendant Snipes conceded that venue is proper in this District for at least the conspiracy charge (Count I) and the § 287 fraud charge (Count II). With respect to the failure to file counts (Counts III through VIII), counsel for Defendant Snipes also conceded that the proper procedure for challenging venue is to submit all disputed issues of fact to the jury under a preponderance of the evidence standard of proof.[2] *See United States v. Stickle*, 454 F.3d 1265,

---

[1] The Court also notes that the Assistant United States Attorney, as an officer of the Court, has represented that no one from the Government has ever affirmatively stated that the handwriting exemplar is relevant only to the § 287 charge.

[2] Upon direct questioning by the Court, counsel was unable to provide any legal authority to support his request that venue be determined in advance of trial.

1271-72 (11th Cir. 2006); *United States v. Breitweiser*, 357 F.3d 1249, 1253 (11th Cir. 2004). Rather, in addition to making numerous accusations of prejudice and bigotry on the part of the residents of the Ocala Division, Defendant Snipes argues that venue in the Ocala Division of the Middle District of Florida is improper because the racial disparity between the jury venire for the Ocala Division and the Manhattan Division of the Southern District of New York is far greater than 10%.[3]

However, as the Government correctly points out, (Doc. 294), Defendant Snipes has engaged in a faulty comparison. To determine whether a defendant's Fifth and Sixth Amendment rights have been violated by selection of a racially discriminatory venue, the proper comparison is between the percentage of the distinctive group in question that is among the qualified jury wheel and the percentage of that same group in the population eligible for jury service. *United States v. Grisham*, 63 F.3d 1074, 1078-79 (11th Cir. 1995). Comparison between different venues is not appropriate. *See, e.g. United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984); *United States v. Tuttle*, 729 F.2d 1325 (11th Cir. 1984). Given the lack of any evidence of a constitutionally relevant racial disparity

---

[3] According to Defendant Snipes, African-Americans (21%) and Latinos (30%) constitute more than half of the jury venire in the Manhattan Division, whereas African-Americans (9%) and Latinos (7%) constitute only 16% of the jury venire in the Ocala Divison [sic].

in the Ocala Division's jury venire, Defendant Snipes' motion is due to be denied.[4]

Defendant Snipes' Motion to Dismiss Indictment or For an Alternative Sanction, (Doc. 280), is DENIED. The motion asserts the following alleged acts by the Government: (1) an improper disclosure of Defendant Snipes' income tax returns in another related civil matter; (2) a false representation during grand jury proceedings concerning the use of Defendant Snipes' handwriting exemplar; (3) the failure to offer Snipes his conferencing rights under *United States v. LaSalle National Bank*, 437 U.S. 298, 98

---

[4] The Court is also unpersuaded by Defendant Snipes' arguments under Fed.R.Crim.P. 21(b) that venue should be transferred to the Southern District of New York in the interests of justice. As the Court has previously made abundantly clear, (*see* Doc. 188, pp. 13-21), there are no compelling reasons to transfer this case to another venue, particularly where the case involves two co-conspirators with strong ties to Florida, and where the question of Defendant Snipes [sic] place of residence during the relevant time period remains a fact question very much in dispute. Defendant Snipes' reliance on Rule 1.02(d) of the Local Rules of the Middle District of Florida is equally misplaced. The Superseding Indictment alleges actions by the Defendants in both Lake County, which is within the Ocala Division, and Orange County, which is within the Orlando Division. Because at least some of the acts are alleged to have taken place within the Ocala Division, transfer of this case is not appropriate. Moreover, "an indictment returned in any Division shall be valid regardless of the county or counties within the District in which the alleged offense or offenses were committed." Local Rule 1.02(d). *See also Pepe*, 747 F.2d at 647, n. 15 (noting that defendants have no constitutional rights to venue within a division).

S.Ct. 2357, 57 L.Ed.2d 221 (1978); and (4) the Government's reference to Snipes in the press as a fugitive. The Court has carefully reviewed Defendant Snipes' allegations, as well as the relevant case law and finds that the Government did not engage in any improper conduct.[5] More importantly, Defendant Snipes has utterly failed to demonstrate any prejudice that he has or will suffer as a result of these alleged Government actions.

Defendant Snipes' Motion to Exclude Exemplars Taken in Violation of the Fifth Amendment, (Doc. 281), is DENIED. In the motion itself, Defendant Snipes concedes "that current Eleventh Circuit caselaw allows state compelled exemplars without meaningful limitation and simply preserves a good faith challenge to that existing precedent." *See* Doc. 281, p. 1; *see also Gilbert v. California,* 388 U.S. 263, 266-67, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967); *United States v. Stone,* 9 F.3d 934, 942 (11th Cir. 1993). Defendant Snipes' objection is duly noted for the record.

Defendant Snipes' Renewed Motion For Transfer to District of Residence Pursuant to 18 U.S.C.

---

[5] For example, the Court finds that the Government did not violate any disclosure rules when it attached Defendant Snipes' 1997 amended tax return to a filing in a tax civil matter against co-Defendant Rosile. *See* 26 U.S.C. § 6103(h)(4)(C). The Court further finds that to the extent any pre-indictment conference rights may exist under *LaSalle* or any other legal authority, they do not apply to grand jury investigations and do not apply where the defendant does not request such a conference, as appears to be the case here.

§ 3237(b), (Doc. 282), is DENIED. The Court previously denied this very same motion on timeliness grounds, *see* Doc. 188, p. 11-13, and Defendant Snipes' new counsel have not raised any additional arguments to persuade the Court that this prior ruling should be altered.

Defendant Snipes' Motion for Pretrial Status Conference, (Doc. 296), and the United States' Motion for Hearing Regarding Candor to the Court and Potential Conflict of Interest, (Doc. 303), are DENIED AS MOOT. The Parties had an opportunity to be heard on all pending motions, including the issues raised in both of these motions, during the December 11, 2007 hearing. In addition, the majority of the issues Defendant Snipes' counsel wishes to address with the Court were previously resolved in the Court's October 3, 2007 Order. (Doc. 216).

### *II. Motions of Defendant Eddie Ray Kahn*

Defendant Eddie Ray Kahn's Motion to Continue Trial, (Doc. 262), is DENIED. Defendant Kahn seeks a 138-day continuance on the grounds that he has not received any discovery in this case, and requires additional time to review over 800,000 discovery documents. This motion is without merit because the Government has provided Defendant Kahn with all discovery as it has become available, and informed Defendant Kahn of the existence of any other discovery that would be available for review. A continuance

is not warranted based on Defendant Kahn's own failure to engage in discovery review.[6]

Defendant Kahn's Motion for All Discovery, (Doc. 263), and Motion To Exclude All Evidence Against Kahn For Massive Discovery Violations, (Doc. 268), are DENIED for the same reasons. The Government has either provided to Defendant Kahn all discovery, or made discovery available for inspection and review. To the extent Defendant Kahn seeks *Giglio* or *Brady* discovery materials, that request is due to be denied for the same reasons set forth in the Court's November 2, 2007 Order denying Defendant Snipes' identical request. *See* Doc. 261.

Defendant Kahn's Motion to Dismiss for Want of Personal Jurisdiction, or Alternatively, Motion for Plaintiff's Misconduct, (Doc. 264), is DENIED for the reasons set forth in the Government's response in opposition. (Doc. 286). *See also United States v. Alvarez-Machain,* 504 U.S. 655, 112 S.Ct. 2188, 119 L.Ed.2d 441 (1992); *United States v. Arbane,* 446 F.3d 1223 (11th Cir. 2006).

Defendant Kahn's Motion to Adopt Snipes' Motion for Immediate *Brady* and *Giglio* Material as His Own, (Doc. 266), is DENIED AS MOOT. The Court previously denied Defendant Snipes' underlying motion on November 2, 2007. *See* Doc. 261.

---

[6] See the United States' Combined Response. (Doc. 285). The record is not inconsistent with the representations of the Government made in that Response.

Defendant Kahn's Motion for Disclosure of State Department File, (Doc. 267), is DENIED. The Government asserts that it is unaware of the existence of any such file, and Defendant Kahn has not demonstrated why the disclosure of such a file, assuming it does exist, would be relevant to any issue in this case.

Defendant Kahn's Notice of Motion and Motion to Depose Judge With Accompanying Memorandum of Law, (Doc. 269), is without merit, does not cite to any relevant legal authority, and is therefore DENIED.

Defendant Kahn's Motion to Disqualify Judge Wm. Terrell Hodges From Case # 5:06-cr-22, (Doc. 270), is DENIED. Defendant Kahn bases his motion on the fact that he believes I have a "vendetta" against him and because the Court has denied all of Kahn's motions and "notices" as frivolous and without merit. Defendant Kahn further contends, without any legal or factual support, that I am not an Article III Judge, but am in actuality impersonating a federal judicial officer.[7] In other words, Defendant Kahn bases his entire motion on judicial rulings and other actions I have taken in my role as United States District Judge – he has presented no evidence or made any allegations that any supposed bias stems

---

[7] This claim comes as a surprise after thirty-six years of service, especially since I have the benefit of a mandate of the Supreme Court of the United States (perhaps the only one of its kind) refusing certiorari to review the Court of Appeals' refusal to enjoin my investiture in 1971. *Fair v. Hodges,* 409 U.S. 872, 93 S.Ct. 202, 34 L.Ed.2d 123 (1972).

from extrajudicial sources. *See* 28 U.S.C. §§ 455(a), (b)(1); *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 16 L.Ed.2d 778 (1966) (judicial rulings alone almost never constitute a valid basis for recusal based on bias or partiality); *Litekey v. United States,* 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994) (judicial rulings, without any evidence of extrajudicial bias, may form the basis of an appeal, not recusal); *United States v. Bailey,* 175 F.3d 966, 968 (11th Cir. 1999) ("Bias sufficient to disqualify a judge under § 455(a) and § 455(b) (1) must stem from extrajudicial sources, unless the judge's acts demonstrate 'such pervasive bias and prejudice that it unfairly prejudices one of the parties.'") (quoting *United States v. Ramos,* 933 F.2d 968, 973 (11th Cir. 1991). Accordingly, Defendant Kahn has failed to satisfy the statutory standards for recusal set forth under 28 U.S.C. § 455.

### *III. Motions of Defendant Douglas P. Rosile*

Defendant Douglas P. Rosile's Motion to Strike Surplusage From Indictment, (Doc. 203), is DENIED WITHOUT PREJUDICE. The Court will reserve ruling until the Court has heard all evidence that will establish the relevance of the allegedly surplus language. *See United States v. Awan,* 966 F.2d 1415, 1426 (11th Cir. 1992). Moreover, the Court has already created, with approval of all Parties, a redacted version of the Superseding Indictment to provide to the jury at trial. (Doc. 216). Defendant Rosile may revisit this issue at the appropriate time during trial.

### *IV. Motions Relating to All Defendants*

The United States' Motion In Limine to Exclude Anticipated Tax-Protestor "Evidence" and Argument, (Doc. 208), is CARRIED WITH THE CASE. The United States is free to raise any appropriate objection if and when any party seeks to introduce such evidence and/or argument at trial.

The United States' Unopposed Motion to Continue Trial Subpoenas, (Doc. 232), is GRANTED.

The Joint Motion By All Co-Defendants For a Continuance Based on Newly Discovered 1.6 Million or More Pages of Discovery, (Doc. 321), is DENIED. The Defendants contend that an additional three-month continuance is necessary in order to review approximately 1.6 million pages of allegedly newly discovered evidence. However, as the Government explained at the hearing, counsel for the Defendants have been well-aware of this additional discovery since at least the time of each Defendant's arraignment, and the Court finds that Defendant Snipes' new counsel received this discovery from prior counsel in a timely manner. At the time of arraignment, the Government provided each Defendant with the vast bulk of all discovery, and informed each Defendant that the electronic discovery now in question was available for inspection and copying upon request. The Government further explained at the hearing that the majority of the electronic discovery consists either of computer software programs or copies of documents previously provided to the

Defendants in hard copy or other form, and that the Government intends to use at trial only approximately 20 documents which originated from electronic form. The Court is therefore convinced that the Government has not deliberately withheld any important discovery materials from any Defendant, and that the Defendants have had an ample opportunity to review and analyze the discovery material and prepare adequately for the trial of this case. Moreover, the Defendants have not demonstrated any specific prejudice that will result from the denial of a continuance to review what are largely irrelevant and/or duplicative materials.

The Clerk is directed to send a copy of the transcript from the December 11, 2007 hearing directly to Defendant Snipes, along with a copy of this Order.

IT IS SO ORDERED.

DONE and ORDERED.

---

## APPENDIX D

512 F.3d 1301

**United States Court of Appeals,**
**Eleventh Circuit.**

UNITED STATES of America,
Plaintiff-Appellee,
v.
Wesley Trent SNIPES,
Defendant-Appellant.

No. 08-10114.
Jan. 8, 2008.

Peter Goldberger, Ardmore, PA, Robert Gerald Bernhoft, The Law Office of Robert G. Bernhoft, S.C., Milwaukee, WI, for Snipes.

Patricia D. Barksdale, Jacksonville, FL, for U.S.

Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON, HULL and MARCUS, Circuit Judges.

BY THE COURT:

Now pending before the Court is Appellee's motion to dismiss this appeal for lack of jurisdiction as an impermissible interlocutory appeal and Appellant's motion to stay the trial below pending resolution of this appeal.

In arguing that this Court lacks jurisdiction over this interlocutory appeal, Appellee acknowledges that there is no controlling precedent from this Circuit finding that an immediate appeal will not lie from an order pertaining to venue in a criminal case.

However, Appellee points to cases from four other circuits in which those courts have concluded that such an order is not immediately appealable. *See United States v. Blackwell,* 900 F.2d 742, 746-47 (4th Cir. 1990); *United States v. French,* 787 F.2d 1381, 1383 (9th Cir. 1986); *United States v. Martin,* 620 F.2d 237, 238 (10th Cir. 1980); *United States v. Garber,* 413 F.2d 284, 285 (2d Cir. 1969).

In response to Appellee's motion to dismiss, Appellant maintains that his appeal presents a colorable jurisdictional claim and thus, that it meets the requirements for jurisdiction under the collateral order doctrine. Appellant also argues that this appeal meets the requirements of the collateral order doctrine inasmuch as it will conclusively determine the disputed question, will resolve an important issue completely separate from the merits of the action and will be effectively unreviewable on appeal from a final judgment. *See Will v. Hallock,* 546 U.S. 345, 126 S.Ct. 952, 957, 163 L.Ed.2d 836 (2006).

We conclude that this Court lacks jurisdiction over this appeal under the collateral order doctrine. We conclude that an order pertaining to venue is effectively reviewable after entry of judgment. *See e.g., United States v. Campa,* 459 F.3d 1121 (11th Cir. 2006).[1]

---

[1] The claims in this case are unlike cases involving the right not to be subjected to double jeopardy and similar rights which would be lost by going to trial. In this case, Appellant's claim can be adequately reviewed and any rights vindicated on direct appeal.

Accordingly, we GRANT Appellee's motion to dismiss this appeal for lack of jurisdiction.

We DENY AS MOOT Appellant's motion for stay pending appeal and also DENY Appellant's invitation to retain jurisdiction and to stay the pending trial below in order to allow Appellant to file a petition for writ of mandamus.

---

**APPENDIX E**

**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE ELEVENTH CIRCUIT**

---

No. 08-12402-HH

---

UNITED STATES OF AMERICA,

Plaintiff-Appellee
Cross-Appellant,

versus

WESLEY TRENT SNIPES,

Defendant-Appellant
Cross-Appellee.

---

On Appeal from the United States
District Court for the Middle District of Florida

---

(Filed Sep. 29, 2010)

Before: MARCUS, FAY and ANDERSON, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE

## APPENDIX F

### Constitutional Provisions, Statutes and Rules Involved

Article III, Section 2, Clause 3 of the Constitution of the United States provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const. art. III, § 2, cl. 3.

---

The Fifth Amendment to the Constitution of the United States provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V.

---

No. 10-1075

# In the Supreme Court of the United States

WESLEY TRENT SNIPES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION


NEAL KUMAR KATYAL
*Acting Solicitor General*
*Counsel of Record*
JOHN A. DICICCO
*Principal Deputy Assistant Attorney General*
FRANK P. CIHLAR
GREGORY VICTOR DAVIS
S. ROBERT LYONS
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*SupremeCtBriefs@usdoj.gov*
*(202) 514-2217*

## QUESTIONS PRESENTED

1. Whether Article III or the Sixth Amendment required the district court to conduct, at petitioner's request, an evidentiary hearing to determine whether venue was proper before submitting the issue to the jury.

2. Whether the Fifth and Sixth Amendments required the government to prove the facts establishing venue beyond a reasonable doubt.

## TABLE OF CONTENTS


Page

Opinions below ..... 1
Jurisdiction ..... 1
Statement ..... 2
Argument ..... 9
Conclusion ..... 20


## TABLE OF AUTHORITIES

Cases:


*Apprendi* v. *New Jersey*, 530 U.S. 466 (2000) ..... 18, 19
*Corwin* v. *Walt Disney Co.*, 475 F.3d 1239 (11th Cir. 2007) ..... 7
*Cunningham* v. *California*, 549 U.S. 270 (2007) ..... 18
*Elgindy* v. *United* States, 130 S. Ct. 83 (2009) ..... 16
*Harris* v. *United States*, 536 U.S. 545 (2002) ..... 18
*Jackson* v. *Denno*, 378 U.S. 368 (1964) ..... 10, 11
*Johnston* v. *United States*, 351 U.S. 215 (1956) ..... 9
*Neder* v. *United States*, 527 U.S. 1 (1999) ..... 18
*Robles* v. *United States*, 541 U.S. 1044 (2004) ..... 16
*Rommy* v. *United States*, 552 U.S. 1260 (2008) ..... 16
*Simmons* v. *United States*, 390 U.S. 377 (1968) ..... 8, 13
*Travis* v. *United States*, 364 U.S. 631 (1961) ..... 9
*United States* v. *Booker*, 543 U.S. 220 (2005) ..... 18
*United States* v. *Broce*, 488 U.S. 563 (1989) ..... 10, 11
*United States* v. *Calhoun*, 566 F.2d 969 (5th Cir. 1978) ..... 10
*United States* v. *Crozier*, 259 F.3d 503 (6th Cir. 2001), cert. denied, 534 U.S. 1149 (2002) ..... 15

Cases—Continued: Page

*United States* v. *Cryar*, 232 F.3d 1318 (10th Cir. 2000), cert. denied, 532 U.S. 951 (2001) ..... 15
*United States* v. *Dabbs*, 134 F.3d 1071 (11th Cir. 1998) ..... 17
*United States* v. *Gaudin*, 515 U.S. 506 (1995) ..... 18
*United States* v. *Griley*, 814 F.2d 967 (4th Cir. 1987) .... 16
*United States* v. *Hernandez*, 189 F.3d 785 (9th Cir. 1999), cert. denied, 529 U.S. 1028 (2000) ..... 17
*United States* v. *Humphreys*, 982 F.2d 254 (1992), cert. denied, 510 U.S. 814 (1993) ..... 14
*United States* v. *Johnson*, 462 F.3d 815 (8th Cir. 2006), cert. denied, 549 U.S. 1298 (2007) ..... 15
*United States* v. *Kaytso*, 868 F.2d 1020 (9th Cir. 1988) ..... 16, 17
*United States* v. *Khan*, 821 F.2d 90 (2d Cir. 1987) ..... 17
*United States* v. *Knox*, 540 F.3d 708 (7th Cir. 2008), cert. denied, 129 S. Ct. 1525 (2009) ..... 17
*United States* v. *Lanoue*, 137 F.3d 656 (1st Cir. 1998) ... 16
*United States* v. *Maldonado-Rivera*, 922 F.2d 934 (2d Cir. 1990), cert. denied, 501 U.S. 1233 (1991) ..... 16
*United States* v. *Marcus*, 130 S. Ct. 2159 (2010) ..... 19
*United States* v. *Massa*, 686 F.2d 526 (7th Cir. 1982) .... 17
*United States* v. *Miller*, 111 F.3d 747 (10th Cir. 1997) ... 17
*United States* v. *Morgan*, 393 F.3d 192 (D.C. Cir. 2004) ..... 15
*United States* v. *Muhammad*, 502 F.3d 646 (7th Cir. 2007), cert. denied, 552 U.S. 1144 (2008) ..... 15, 16
*United States* v. *Olano*, 507 U.S. 725 (1993) ..... 19
*United States* v. *Pace*, 314 F.3d 344 (9th Cir. 2002) ..... 15

Cases—Continued: Page

*United States* v. *Perez*, 280 F.3d 318 (3d Cir.), cert. denied, 537 U.S. 859 (2002) ..... 15, 16, 17
*United States* v. *Pry*, 625 F.2d 689 (5th Cir. 1980), cert. denied, 450 U.S. 925 (1981) ..... 10
*United States* v. *Robinson*, 275 F.3d 371 (4th Cir. 2001), cert. denied, 535 U.S. 1006 (2002) ..... 15
*United States* v. *Rodriguez-Moreno*, 526 U.S. 275 (1999) ..... 12
*United States* v. *Rommy*, 506 F.3d 108 (2d Cir. 2007), cert. denied, 552 U.S. 1260 (2008) ..... 15
*United States* v. *Salinas*, 373 F.3d 161 (1st Cir. 2004) ... 15
*United States* v. *Scott*, 437 U.S. 82 (1978) ..... 11
*United States* v. *Stickle*, 454 F.3d 1265 (11th Cir. 2006) ..... 15, 16
*United States* v. *Strain*, 396 F.3d 689 (5th Cir. 2005) .... 15
*United States* v. *Winship*, 724 F.2d 1116 (5th Cir. 1984) ..... 17
*Wilkett* v. *United States*, 655 F.2d 1007 (10th Cir. 1981), cert. denied, 454 U.S. 1142 (1982) ..... 16, 17
*Winship, In re*, 397 U.S. 358 (1970) ..... 18

Constitution, statutes and rules:

U.S. Const.:
Art. III ..... 9
§ 2, Cl. 3 ..... 9
Amend. IV ..... 8, 13
Amend. V: ..... 8, 13, 18
Double Jeopardy Clause ..... 11
Amend. VI ..... 6, 9, 18

Statutes and rules--Continued: Page

18 U.S.C. 2 ..... 3
18 U.S.C. 287 ..... 3
18 U.S.C. 371 ..... 3
18 U.S.C. 924(c)(1) ..... 12
18 U.S.C. 3237(b) ..... 3, 4, 7, 14
18 U.S.C. 3501(a) ..... 11
26 U.S.C. 861 ..... 2
26 U.S.C. 6091(b)(1)(A)(i) ..... 10, 14
26 U.S.C. 6091(b)(1)(A)(ii) ..... 10, 14
26 U.S.C. 7203 ..... 2, 3, 4, 9
Fed. R. Crim. P.:
Rule 12(c) ..... 7, 14
Rule 18 ..... 9
Rule 21(b) ..... 3, 4, 5
Rule 52(b) ..... 19

Miscellaneous:

Jesse Kornbluth, *Architectural Digest Visits Wesley Snipes, A Lakeside Residence in Florida for the Star of White Men Can't Jump and Passenger 57, Architectural Digest*, Apr. 1997 ..... 14
Lynn Norment, *Black Woman Designs, Cecil Hayes combines African and Asian influences in actor's sunny getaway, Ebony*, Nov. 1997 ..... 14

# In the Supreme Court of the United States

No. 10-1075

WESLEY TRENT SNIPES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-34) is reported at 611 F.3d 855. The orders of the district court denying petitioner's motions for a change of venue (Pet. App. 35-59, 60-74) are unpublished.

### JURISDICTION

The judgment of the court of appeals was entered on July 16, 2010. A petition for rehearing was denied on September 29, 2010 (Pet. App. 78-79). On December 22, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 11, 2011. On February 1, Justice Thomas further extended the time within which to file a petition for a writ of certiorari to and including February 26, 2011. The petition for a writ of certiorari was filed on Febru-

ary 28, 2011 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on three counts of willfully failing to file personal federal income tax returns for 1999, 2000, and 2001, in violation of 26 U.S.C. 7203. The district court sentenced petitioner to three consecutive one-year prison terms, to be followed by one year of supervised release. Pet. App. 11-12. The court of appeals affirmed. *Id.* at 1-34.

1. Around the year 2000, petitioner became involved in an organization called American Rights Litigators (ARL), which was formed to encourage resistance to the tax collection efforts of the Internal Revenue Service (IRS). Pet. App. 2. ARL's principal argument was that domestic earnings of individual Americans do not qualify as taxable income, because the earnings do not come from a source listed in 26 U.S.C. 861. Pet. App. 2. Consistent with the argument promoted by ARL, petitioner failed to file personal income tax returns from 1999 through 2004, despite earning more than $37 million in gross income during those years as a movie actor and producer. *Id.* at 2-3.

In correspondence with the IRS, petitioner advanced several additional justifications for his failure to file personal income tax returns. Petitioner asserted that he was a "non-resident alien to the United States," that "a taxpayer is defined by law as one who operates a distilled spirit Plant," and that the Internal Revenue Code's taxing authority "is limited to the District of Columbia and insular possessions of the United States,

exclusive of the 50 States of the Union." Pet. App. 3. Petitioner also claimed that as a "fiduciary of God, who is a 'nontaxpayer,'" he was a "foreign diplomat" who was not obliged to pay taxes. *Ibid.*

In addition to not filing current year returns, petitioner filed amended returns for prior years, claiming that he was entitled to millions of dollars in refunds under the same theories. Pet. App. 3-4 & n.3. Petitioner also sent four official IRS Payment Vouchers (Form 1040-ES) to the Department of Treasury, together with fraudulent Bills of Exchange, in which he purported to draw upon a fictitious personal account. *Id.* at 4 n.3.

2. On October 12, 2006, a federal grand jury sitting in the Middle District of Florida returned a superseding indictment charging petitioner with conspiracy to defraud the United States by impeding the IRS in its collection of income taxes, in violation of 18 U.S.C. 371; filing a false claim for a tax refund, in violation of 18 U.S.C. 2 and 287; and six counts of willfully failing to file individual federal income tax returns for calendar years 1999 through 2004, in violation of 26 U.S.C. 7203. Pet. App. 5. The indictment alleged that venue for the six failure-to-file counts lied in the Middle District of Florida because petitioner was "a resident of Windermere in Orange County, Florida." *Id.* at 49.

a. At the time of arraignment, a magistrate judge set a pretrial motion deadline of January 12, 2007, and the magistrate judge later extended the deadline, at petitioner's request, until June 4, 2007. Pet. App. 5-6. On that date, petitioner filed several pretrial motions, including a motion to transfer venue to the Southern District of New York pursuant to 18 U.S.C. 3237(b) and Federal Rule of Criminal Procedure 21(b). Pet. App. 6.

Under Section 3237(b), if the government brings Section 7203 failure-to-file charges against a taxpayer in a district other than the district where the taxpayer resides, the taxpayer may elect to instead be tried "in the district in which he was residing at the time the alleged offense was committed," provided he files a motion stating his election "within twenty days after arraignment." Because petitioner's motion was filed outside the 20-day statutory period, the district court denied petitioner's motion for elective transfer as untimely. Pet. App. 47-48. The district court further noted that the indictment alleged that petitioner was a legal resident of Windermere, Florida, and that the location of petitioner's legal residence was therefore a "disputed issue[] of fact [that] must be submitted to the jury under a preponderance of the evidence standard of proof." *Id.* at 49.

The district court also denied petitioner's motion to transfer venue to the Southern District of New York under Federal Rule of Criminal Procedure 21(b). Pet. App. 51-59. The court concluded that any hardship to petitioner of being tried in the Middle District of Florida was insufficient to outweigh the hardship a transfer of venue would place on petitioner's co-defendants and on many Florida-based witnesses. *Id.* at 54.

b. Several months later, petitioner retained new counsel and filed another motion challenging venue, this time asserting that the government had chosen the trial location for racially discriminatory reasons. Pet. App. 6. Petitioner again attempted to elect venue in the Southern District of New York under 18 U.S.C. 3237(b), arguing that the ineffective assistance of his prior counsel constituted "good cause" for disregarding the statutory 20-day deadline, and he again requested a transfer of venue under Rule 21(b). Pet. App. 6-7. The court denied

petitioner's motion, explaining that petitioner had failed to demonstrate a constitutionally relevant racial disparity in the Ocala Division's jury venire, *id.* at 66-67, that petitioner had not raised any new arguments demonstrating that his elective transfer request was timely, *id.* at 68-69, and that petitioner had identified no compelling reasons for transfer under Rule 21(b), especially given that petitioner's place of residence was "a fact question very much in dispute," *id.* at 67 n.4. The court also explained that petitioner had identified no legal authority to support his request that venue be determined in advance of trial, instead of by the jury. *Id.* at 65 n.2.

c. Petitioner filed a notice of appeal, contending that the district court's venue rulings were subject to interlocutory review under the collateral order doctrine. Pet. App. 75-77. The court of appeals dismissed the appeal, explaining that an order pertaining to venue was not subject to interlocutory review as a collateral order because it was effectively reviewable after entry of judgment. *Ibid.*

3. At trial, the government presented evidence showing that petitioner's legal residence was in Windermere, Florida. The evidence showed that petitioner was born in Florida and has maintained a Florida driver's license since 1978. Gov't C.A. Br. 25. The evidence also showed that petitioner purchased a home in Windermere in 1992 and used that address to renew his driver's license in 1997, and again in 2004. *Ibid.* The government presented further evidence showing that petitioner had represented in contracts that he signed in 1996, 2001, and 2003 for his appearances in the *Blade* movies that his "current place of residence is Windermere, Florida," and that based upon those representations, "the movie makers agreed to pay petitioner travel-related expenses

(such as first-class airfare, a weekly allowance of $2000, and monthly hotel reimbursement of up to $10,000) if his services were needed more than 75 miles from Windermere." *Ibid.* Finally, the government presented several documents that petitioner filed with the Comptroller of Orange County, Florida, in March 2003, in which petitioner averred that he was a citizen of Florida, that he had maintained his "de jure domicile" in Orange County since 1977, and that he intended Windermere to be his "permanent," "predominant," and "principal" home even if he buys additional houses elsewhere. *Id.* at 26.

After the United States presented its case-in-chief, petitioner moved for judgment of acquittal on the 1999 failure-to-file count on the ground that the statute of limitations had expired, and he also moved for judgment of acquittal on the false claim charge. Pet. App. 8 & n.4. Petitioner did not, however, seek a judgment of acquittal on the ground that the government had failed to prove venue. The court denied petitioner's motion, and petitioner rested without presenting any evidence. *Id.* at 8. At the close of trial, the district court denied petitioner's renewed motion for judgment of acquittal. *Ibid.*

b. The district court instructed the jury that the Sixth Amendment protects a defendant's right to a trial in the State and district in which the crime was committed and that for the failure-to-file counts, venue was proper in the district of petitioner's "legal residence," which the parties agreed should be defined as "the permanent fixed place of abode which one intends to be his residence and return to it, despite absences or temporary residence elsewhere." Pet. App. 8; Gov't C.A. Br. 47. The court also instructed the jury that if the government failed to prove that petitioner's legal residence was within the Middle District of Florida by a preponderance of

the evidence, the jury must acquit petitioner of the failure-to-file counts. Pet. App. 8-9; Gov't C.A. Br. 47.

The jury convicted petitioner of failure to file personal income tax returns for the years 1999, 2000, and 2001, and acquitted petitioner on the remaining counts. Pet. App. 10. The district court sentenced petitioner to three consecutive one-year prison terms, to be followed by one year of supervised release. *Id.* at 11-12.

4. The court of appeals affirmed. Pet. App. 1-34. The court rejected petitioner's argument that the district court could extend the 20-day statutory time limit set forth in Section 3237(b) for elective transfer of venue by extending the time for filing pretrial motions pursuant to Federal Rule of Criminal Procedure 12(c). Pet. App. 12-15. The court explained that the 20-day statutory filing deadline is "unambiguous and unqualified," *id.* at 14, and that Rule 12(c), which "merely affords the district court the discretion to set pretrial deadlines," did not supersede Congress's clear statutory directive, *id.* at 14-15.

The court further rejected petitioner's argument that the district court had abused its discretion by refusing to waive the 20-day statutory deadline based on the "excusable neglect" of his attorney, explaining that "[c]ounsel's misunderstanding of the law cannot constitute excusable neglect." Pet. App. 15 (citing *Corwin* v. *Walt Disney Co.*, 475 F.3d 1239, 1255 (11th Cir. 2007) (citation omitted)). The court also noted that in any event, petitioner's first request for the district court to extend the pretrial motion deadline was filed after the 20-day statutory deadline for elective transfer of venue had already expired. *Ibid.*

The court of appeals also rejected petitioner's argument that he was entitled to a pretrial evidentiary hear-

ing to determine venue. Pet. App. 16-20. The court explained that "[a]s with resolving other elements contained in a charge, a jury must decide whether the venue was proper," *id.* at 17, and that indeed "it would not have been proper for the district court to find the appropriate venue in a pretrial evidentiary hearing * * * [because] a court may not dismiss an indictment * * * on a determination of facts that should have been developed at trial," *id.* at 18. The court further rejected petitioner's argument that under *Simmons* v. *United States*, 390 U.S. 377 (1968), he should have been afforded a pretrial hearing on venue so that he would not be forced to testify at his trial about his residence. Pet. App. 18. The court explained that in *Simmons*, this Court held that a defendant's testimony in a Fourth Amendment pretrial suppression hearing could not be admitted at trial consistent with the Fifth Amendment privilege against self-incrimination because it was "intolerable that one constitutional right should have to be surrendered in order to assert another." *Id.* at 18-19 (quoting *Simmons*, 390 U.S. at 394). The court of appeals explained, however, that "*Simmons* has never been extended beyond its context" and that "[u]nlike the Fourth Amendment right, protected by the exclusionary rule, the Sixth Amendment right to have venue proven as an element of the offense is safeguarded by integrating it into the trial." *Id.* at 19-20.

The court of appeals further rejected petitioner's argument that the government had presented insufficient evidence to prove that petitioner's legal residence was within the Middle District of Florida. Pet. App. 20 n.7. Reviewing petitioner's sufficiency claim for plain error, the court concluded that the government had provided ample evidence from which the jury could con-

clude by a preponderance of the evidence that petitioner was a resident of Windermere, Florida. *Ibid.*[1]

## ARGUMENT

1. Petitioner contends (Pet. 11-27) that Article III, § 2, Cl. 3, and the Sixth Amendment require the district court to conduct, at the defendant's request, a pretrial evidentiary hearing on venue before submitting the issue to the jury. The court of appeals correctly rejected this argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

a. Article III of the Constitution requires that the trial of crimes "be held in the State where the said Crimes shall have been committed," U.S. Const. Art. III, § 2, Cl. 3, and the Sixth Amendment entitles the defendant to a jury of "the State and district wherein the crime shall have been committed," U.S. Const. Amend. VI; see also Fed. R. Crim. P. 18. For a crime charging the omission of a legally required act, such as the failure-to-file charges brought against petitioner under 26 U.S.C. 7203, the crime is committed in the place where the act was required to be performed. See, *e.g.*, *Travis* v. *United States*, 364 U.S. 631, 636 (1961); *Johnston* v. *United States*, 351 U.S. 215, 220 (1956). During the relevant time period, the Internal Revenue

---

[1] The court of appeals did not address petitioner's argument (Pet. 27-36) that the facts establishing venue must be proved beyond a reasonable doubt. Recognizing that established circuit precedent required application of the preponderance standard, petitioner had simply stated in a footnote in his opening brief to the court of appeals that he "raises and preserves" the standard of proof issue "for review at another level." Pet. C.A. Br. 29 n.22. Petitioner presented arguments in support of his position for the first time in his petition for en banc review, which the court denied without opinion. Pet. App. 78-79.

Code required personal tax returns to be filed in the internal revenue district of the taxpayer's legal residence or at an IRS service center for that internal revenue district. 26 U.S.C. 6091(b)(1)(A)(i) and (ii). Accordingly, venue for failure-to-file charges lies both in the judicial district of a defendant's legal residence and in the judicial district of the IRS service center servicing that district. See *United States* v. *Pry*, 625 F.2d 689, 691 (5th Cir. 1980), cert. denied, 450 U.S. 925 (1981); *United States* v. *Calhoun*, 566 F.2d 969, 973 (5th Cir. 1978).

Petitioner asserts that he was entitled to a jury determination of the propriety of venue in the Middle District of Florida, but at the same time he contends that his jury was "constitutionally incompetent" to make a venue determination. Pet. 15-16. Accordingly, he maintains, he was therefore *also* entitled to a pretrial evidentiary hearing on that issue. Pet. 16, 26 ("The fundamental basis for petitioner's argument is that a defendant cannot be required to entrust the question of venue, as a factual matter, to the very jury from which he claims the Constitution protects him from being judged."). Petitioner has identified no court adopting that view, and nothing in this Court's cases indicates that such a pretrial proceeding is required to determine venue.

In support of his position, petitioner states that this Court has recognized in other contexts that "[s]ometimes, * * * a question must be decided twice" to adequately protect the constitutional right at issue. Pet. 19 (citing *United States* v. *Broce*, 488 U.S. 563, 571 (1989); *Jackson* v. *Denno*, 378 U.S. 368 (1964)). The issues raised in the cases petitioner cites are not analogous to a venue determination. In *Broce*, the Court held that, by pleading guilty to two conspiracies, the defendants had

waived their right to have a "trial-type proceeding" before trial for a court to evaluate their argument that they were being tried twice for the same conspiracy in violation of the Double Jeopardy Clause. 488 U.S. at 571. A defendant may be entitled to a pretrial hearing on his Double Jeopardy claim, given that the right not to be tried twice would be defeated even if he were acquitted. The right to be tried in a proper venue, however, is fully protected by a jury determination that venue was improper. Indeed, the district court instructed petitioner's jury that it must "acquit" petitioner on the failure-to-file counts if the government failed to prove facts establishing petitioner's residence in the Middle District of Florida by a preponderance of the evidence. Pet. App. 8-9.[2]

Petitioner's reliance on *Jackson* v. *Denno*, 378 U.S. 368 (1964) and 18 U.S.C. 3501(a) is likewise misplaced. Those authorities stand for the proposition that if a court determines in a pretrial proceeding that a confession was voluntary and therefore need not be suppressed, the defendant may still attack the confession at trial. See *Denno*, 378 U.S. at 390-391. In the suppression context, where the remedy for violation of a constitutional right is to withhold probative evidence from the jury at trial, a pretrial evidentiary hearing is clearly necessary to protect the constitutional right at issue. Again, the defendant's right to be tried in the district

---

[2] A ruling that venue is improper is not an "acquittal" in the double-jeopardy sense because it does not represent a determination "in the defendant's favor * * * of some or all of the factual elements of the offense charged." *United States* v. *Scott*, 437 U.S. 82, 111 (1978) (brackets omitted). Accordingly, a jury's determination that venue is improper does not bar reprosecution in another district. See pp. 16-17, *infra*.

where his crime was committed can be fully vindicated if the jury determines that the charges were brought in an improper venue. See Pet App. 19-20 ("Unlike the Fourth Amendment right, protected by the exclusionary rule, the Sixth Amendment right to have venue proven as an element of the offense is safeguarded by integrating it into the trial.").

Petitioner further contends (Pet. 18-19) that "language of this Court's most recent venue decision" in *United States* v. *Rodriguez-Moreno*, 526 U.S. 275, 279 (1999), supports his position. In *Rodriguez-Moreno*, the defendant had been charged with a violation of 18 U.S.C. 924(c)(1) in the District of New Jersey, where he had taken a kidnapping victim before later driving to Maryland and threatening the victim with a firearm. 526 U.S. at 276-277. The defendant argued that venue was proper only in the District of Maryland because that was the only district in which the government had proved he had used a firearm, and he moved to dismiss the Section 924(c)(1) count on that basis. *Id.* at 277. Although the district court denied the motion and the jury convicted petitioner, the Third Circuit agreed that venue was improper and reversed the conviction. *Id.* at 277-78. In reversing the Third Circuit's decision, this Court stated that to determine whether venue is proper, "a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *Id.* at 279. That language accurately describes a district court's role in evaluating a motion to dismiss based on the allegations set forth in the indictment, or a court of appeals' role in evaluating whether venue was improper as a matter of law on appeal. The statement in no way indicates that the district court must conduct an evidentiary hear-

ing to determine whether venue is proper before submitting that issue to the jury.

Finally, petitioner contends (Pet. 20, 25-26) that under *Simmons* v. *United States*, 390 U.S. 377 (1968), in which the Court held that a defendant's testimony in a Fourth Amendment pretrial suppression hearing could not be admitted at trial consistent with the Fifth Amendment privilege against self-incrimination because it was "intolerable that one constitutional right should have to be surrendered in order to assert another," *id.* at 394, petitioner should have been afforded a pretrial hearing on venue so that he could have testified about his place of residence without being forced to testify at trial. But *Simmons* is a Fourth Amendment case that "has never been extended beyond its context." Pet. App. 19. Unlike in *Simmons*, where the unique function of the exclusionary rule warranted a pretrial evidentiary hearing, the constitutional protection of venue can be adequately "safeguarded by integrating it into the trial." *Id.* at 19-20.[3]

---

[3] In any event, the record does not suggest that petitioner was prejudiced by not having a pretrial hearing at which he could testify with *Simmons*' protection. If petitioner had testified at a pretrial hearing, he would have been subjected to sharp cross-examination. For example, petitioner would have been questioned about a civil rights action that he filed challenging a New York court's exercise of jurisdiction over him in a paternity suit, arguing that he "had insufficient ties with the State of New York to meet Fourteenth Amendment due process standards' and asserting that '[a]t no time' between February 2001 and January 2005 was he 'a resident of, or domiciled in, . . . the State of New York." Gov't C.A. Br. 49 n.11. Petitioner would also have had to explain articles published in architecture and design magazines that included detailed descriptions of Snipes' involvement in the design and decoration of his home in Windermere. See Jesse Kornbluth, *Architectural Digest Visits Wesley Snipes, A Lakeside Residence in Florida for*

b. Although petitioner does not contend that the question of whether the district court could extend the 20-day statutory deadline set forth in 18 U.S.C. 3237(b) for elective transfer of venue is independently certworthy, he argues (Pet. 20-23) that the court of appeals should have avoided the constitutional venue question by concluding that his motion for elective transfer was timely filed. Petitioner's constitutional avoidance argument does not help him. The court of appeals correctly concluded that the language of Section 3237(b) is mandatory and that Rule 12(c) did not supersede Congress's statutory directive that elective venue transfers must be made within 20 days of arraignment. Pet. App. 14-15.[4] In any event, Section 3237(b) ensures that if the government brings failure-to-file charges in a district other than the district where petitioner resides, such as the judicial district where the IRS service center servicing that district is located, see 26 U.S.C. 6091(b)(1)(A)(i) and (ii), the taxpayer may elect to transfer venue to the district of his legal residence. Even if petitioner had made

---

*the Star of White Men Can't Jump and Passenger 57, Architectural Digest*, Apr. 1997, at 142; Lynn Norment, *Black Woman Designs, Cecil Hayes combines African and Asian influences in actor's sunny getaway, Ebony*, Nov. 1997, at 194. Thus, even if the district court were permitted to make factual findings about petitioner's legal residence in a pretrial hearing, it is highly improbable that the district court would have determined that venue was improper in this case.

[4] Petitioner asserts that the Eighth Circuit has held that the 20-day statutory deadline is subject to extension at the district court's discretion. See Pet. 22 (citing *United States* v. *Humphreys*, 982 F.2d 254, 260 (1992), cert. denied, 510 U.S. 814 (1993)). That holding cannot fairly be implied from the court's conclusion in that case that the district court had committed no error in denying the defendant's Section 3237(b) election as untimely because "[a]n untimely motion may be denied at the lower court's discretion." *Ibid.*

his election within 20 days after his arraignment, the government had already brought the charges in the district of petitioner's legal residence, and petitioner therefore could not have simply elected venue in the Southern District of New York.

2. Petitioner further contends (Pet. 27-36) that the government should be required to prove the facts establishing venue beyond a reasonable doubt, rather than by a preponderance of the evidence. The courts of appeals have uniformly rejected this argument, and nothing in this Court's decisions indicates that further review is warranted.

a. As petitioner acknowledges (Pet. 29), every court of appeals has held that the government is required to prove facts establishing venue in a criminal case by a preponderance of the evidence. See *United States* v. *Salinas*, 373 F.3d 161, 163 (1st Cir. 2004); *United States* v. *Rommy*, 506 F.3d 108, 119 (2d Cir. 2007), cert. denied, 552 U.S. 1260 (2008); *United States* v. *Perez*, 280 F.3d 318, 329-330 (3d Cir.), cert. denied, 537 U.S. 859 (2002); *United States* v. *Robinson*, 275 F.3d 371, 378 (4th Cir. 2001), cert. denied, 535 U.S. 1006 (2002); *United States* v. *Strain*, 396 F.3d 689, 692 & n.3 (5th Cir. 2005); *United States* v. *Crozier*, 259 F.3d 503, 519 (6th Cir. 2001), cert. denied, 534 U.S. 1149 (2002); *United States* v. *Muhammad*, 502 F.3d 646, 652 (7th Cir. 2007), cert. denied, 552 U.S. 1144 (2008); *United States* v. *Johnson*, 462 F.3d 815, 819 (8th Cir. 2006), cert. denied, 549 U.S. 1298 (2007); *United States* v. *Pace*, 314 F.3d 344, 349 (9th Cir. 2002); *United States* v. *Cryar*, 232 F.3d 1318, 1323 (10th Cir. 2000), cert. denied, 532 U.S. 951 (2001); *United States* v. *Stickle*, 454 F.3d 1265, 1271-1272 (11th Cir. 2006); *United States* v. *Morgan*, 393 F.3d 192, 195 (D.C. Cir. 2004).

This Court, moreover, has repeatedly denied petitions for a writ of certiorari seeking review of this issue on the basis of arguments virtually identical to those petitioner advances. See, *e.g.*, *Elgindy* v. *United* States, 130 S. Ct. 83 (2009) (No. 08-10328); *Rommy* v. *United States*, 552 U.S. 1260 (2008) (No. 07-1031); *Robles* v. *United States*, 541 U.S. 1044 (2004) (No. 03-1438). There is no justification for a different result here.

b. Contrary to petitioner's contention that this uniform rule "has never been examined seriously on its merits" (Pet. 31), the courts of appeals have repeatedly explained that venue need only be proved by a preponderance of the evidence because it does not constitute an element of a criminal offense, see, *e.g.*, *Rommy*, 506 F.3d at 119; *Muhammad*, *supra*; *United States* v. *Lanoue*, 137 F.3d 656, 661 (1st Cir. 1998); *United States* v. *Griley*, 814 F.2d 967, 973 (4th Cir. 1987), or, in the language some courts have employed, a "substantive" or "essential" element of the offense, see, *e.g.*, *Stickle*, 454 F.3d at 1271-1272; *Perez*, 280 F.3d at 330; *United States* v. *Kaytso*, 868 F.2d 1020, 1021 (9th Cir. 1988).

That reasoning is sound. "[U]nlike the substantive facts which bear on guilt or innocence in the case[,] [v]enue is wholly neutral; it is a question of procedure, more than anything else, and it does not either prove or disprove the guilt of the accused." *Wilkett* v. *United States*, 655 F.2d 1007, 1011-1012 (10th Cir. 1981), cert. denied, 454 U.S. 1142 (1982); accord *Perez*, 280 F.3d at 330; *Kaytso*, 868 F.2d at 1021; cf. *United States* v. *Maldonado-Rivera*, 922 F.2d 934, 969 (2d Cir. 1990) ("[V]enue provisions deal not with whether prosecution of a given charge is permissible but only with that prosecution's permissible location."), cert. denied, 501 U.S. 1233 (1991). Thus, a dismissal of the indictment for im-

proper venue does not, on double jeopardy grounds, bar a retrial on the charges in the proper venue. See, *e.g.*, *Kaytso*, 868 F.2d at 1021; *United States* v. *Hernandez*, 189 F.3d 785, 792 & n.5 (9th Cir. 1999), cert. denied, 529 U.S. 1028 (2000); *Wilkett*, 655 F.2d at 1011-1012.

Venue is fundamentally different from the substantive elements of an offense in additional respects. Unlike substantive elements, venue need not even be proved in every case. The issue of proper venue can be waived if not timely raised, see, *e.g.*, *United States* v. *Knox*, 540 F.3d 708, 716 (7th Cir. 2008), cert. denied, 129 S. Ct. 1525 (2009); *Perez*, 280 F.3d at 328; *United States* v. *Dabbs*, 134 F.3d 1071, 1078 (11th Cir. 1998), including where the defendant fails to move to dismiss the case for improper venue before trial based on a defect that is apparent from the face of the indictment, see, *e.g.*, *United States* v. *Khan*, 821 F.2d 90, 93 (2d Cir. 1987). Courts have also noted that "the standard for finding a waiver of venue rights is much more relaxed than the rigorous standard for finding waivers of the right to trial by jury, the right to confront one's accusers or the privilege against compulsory self incrimination." *United States* v. *Winship*, 724 F.2d 1116, 1124 (5th Cir. 1984); accord *United States* v. *Miller*, 111 F.3d 747, 750 (10th Cir. 1997). Moreover, a defendant is not entitled to an instruction on venue except where the evidence at trial places that question sufficiently "in issue" that resolution by the jury is necessary. See *Perez*, 280 F.3d at 333-335 (so holding and discussing standards across circuits for when venue is "in issue"); see also *United States* v. *Massa*, 686 F.2d 526, 530 (7th Cir. 1982) ("[W]here venue is not in issue, no court has ever held that a venue instruction must be given."). By contrast, the jury must always be instructed to find the substan-

tive elements of the offense (although an omitted instruction on an element is reviewed for harmless error). See *Neder* v. *United States*, 527 U.S. 1, 8-11 (1999).

c. Petitioner cites *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995), and *In re Winship*, 397 U.S. 358, 364 (1970), for the proposition that the government must prove every fact necessary to constitute the crime with which a defendant is charged beyond a reasonable doubt. Pet. 27, 31, 32, 34. But because the propriety of venue has no bearing on guilt or innocence, it does not implicate the requirement under the Fifth and Sixth Amendments that a criminal conviction "rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Gaudin*, 515 U.S. at 510; see also *In re Winship*, 397 U.S. at 364. Petitioner's reliance on *Gaudin* and *In re Winship* is accordingly misplaced.

Petitioner further suggests that this Court's recent sentencing decisions have some bearing on the standard of proof for venue. See Pet. 27-28 (citing, *e.g.*, *United States* v. *Booker*, 543 U.S. 220 (2005); *Cunningham* v. *California*, 549 U.S. 270 (2007); *Harris* v. *United States*, 536 U.S. 545 (2002)); see also Pet. C.A. Br. 29 n.22 (stating that petitioner was preserving the burden of proof issue "for review at another level" and citing *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000)). Those decisions addressed the application of the Sixth Amendment to any fact (other than a prior conviction) that "increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490. Facts establishing venue do not belong in that category because, just as they do not relate to the issue of guilt or innocence of the charged offense, they also do not affect the maximum penalties the defendant faces if convicted. For

that reason, the *Apprendi* line of cases does not require that venue be treated as an element of the offense.

d. Finally, this case would be a poor vehicle in which to consider the proper standard of proof for venue determinations because petitioner did not properly preserve his claim. Petitioner did not object to the district court's instruction to the jury that the government must prove the facts establishing venue by a preponderance of the evidence, nor did he move for judgment of acquittal on the ground that the evidence establishing venue was insufficient. As a result, petitioner's claim would be reviewable only for plain error under Federal Rule of Criminal Procedure 52(b). See *United States* v. *Marcus*, 130 S. Ct. 2159, 2164 (2010); *United States* v. *Olano*, 507 U.S. 725 (1993).

To establish plain error, a defendant must show that there was "an 'error' that is 'plain' and that 'affect[s] substantial rights.'" *Olano*, 507 U.S. at 732. Even if a defendant makes such a showing, a reviewing court should correct the error only if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Ibid.* (citations omitted). Especially given that the courts of appeals unanimously apply a preponderance of the evidence standard to facts establishing venue, petitioner cannot establish that any error occurred, much less any error that was plain. Additionally, the evidence showing that petitioner was a legal resident of Windermere, Florida, during the relevant time was overwhelming. See pp. 5-6, 13-14 n.3, *infra*. Petitioner therefore cannot demonstrate that application of the preponderance of the evidence standard to the jury's venue determination affected his substantial rights or seriously undermined the fairness or integrity of his trial.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
*Acting Solicitor General*
JOHN A. DICICCO
*Principal Deputy Assistant Attorney General*
FRANK P. CIHLAR
GREGORY VICTOR DAVIS
S. ROBERT LYONS
*Attorneys*

MAY 2011

188 (3)

No. 10-1075

Supreme Court, U.S.
FILED
MAY 17 2011
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

WESLEY TRENT SNIPES,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## REPLY BRIEF FOR PETITIONER

SAMUEL J. BUFFONE
BRIAN P. KELLY
BUCKLEYSANDLER LLP
1250 24th St., NW, Suite 700
Washington, DC 20037
(202) 349-7940
SBuffone@BuckleySandler.com

PETER GOLDBERGER
*Counsel of Record*
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net

*Of Counsel*:
DANIEL R. MEACHUM
DANIEL R. MEACHUM & ASSOC., LLC
Centennial Tower, Suite 2400
101 Marietta St., NW
Atlanta, GA 30303
(770) 988-9600
dmeachum@dmeachumlaw.com

May 2011

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

1. A defendant's fundamental right under Article III and the Sixth Amendment to be tried in the state and district where the crime was committed is not protected by integrating it into trial through a jury determination in the contested venue..... 1

2. Petitioner's argument regarding the proper standard of proof was sufficiently preserved to permit this Court's review ..... 11

CONCLUSION..... 13

# TABLE OF AUTHORITIES

Page

CASES

*Abney v. United States*, 431 U.S. 651 (1977) .....3

*Apprendi v. New Jersey*, 530 U.S. 466 (2000)..... 7-8

*Blakely v. Washington*, 542 U.S. 296 (2004).....7

*Capital Traction Co. v. Hof*, 174 U.S. 1 (1899) .....5

*Crawford v. Washington*, 541 U.S. 36 (2004).....7

*Dimick v. Schiedt*, 293 U.S. 474 (1935) .....8

*Duncan v. Louisiana*, 391 U.S. 145 (1968) .....4, 5

*Fong Foo v. United States*, 369 U.S. 141 (1962).....4

*Gut v. Minnesota*, 76 U.S. 35 (1869) .....6

*Illinois v. Somerville*, 410 U.S. 458 (1973) .....4

*Ex parte Milligan*, 71 U.S. 2 (1866) .....4

*Oregon v. Kennedy*, 456 U.S. 667 (1982).....4

*U.S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).....5

*United States v. Gaudin*, 515 U.S. 506 (1995).....12

*United States v. Jimenez Recio*,
537 U.S. 270 (2003).....12

*United States v. Johnson*, 323 U.S. 273 (1944) .....6

*United States v. Wood*, 299 U.S. 123 (1936).....6

*Williams v. Florida*, 399 U.S. 78 (1970).....6

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

U.S. Const., art. III, § 2 ..... 2, 5, 6, 8

U.S. Const., amend. IV ..... 2

U.S. Const., amend. V ..... 2, 3, 4

U.S. Const., amend. VI ..... *passim*

OTHER AUTHORITIES

4 William Blackstone, *Commentaries on the Laws of England* (1769) ..... 6

3 Joseph Story, *Commentaries on the Constitution of the United States* § 1775 (1833) ..... 5-6

MISCELLANEOUS

Jesse Kornbluth, *Architectural Digest Visits Wesley Snipes, A Lakeside Residence in Florida for the Star of White Men Can't Jump and Passenger 57*, ARCHITECTURAL DIGEST, Apr. 1997 ..... 10

Lynn Norment, *Black Woman Designs, Cecil Hayes combines African and Asian influences in actor's sunny getaway*, EBONY, Nov. 1997 ..... 10

## REPLY BRIEF FOR PETITIONER

Wesley Trent Snipes's petition for certiorari ("Pet.") shows that this case presents two fundamental procedural issues bearing on enforcement of the constitutional right to be tried on criminal charges only in the proper venue by a jury selected in that venue. The government's Brief in Opposition ("BIO") does not deny the importance of either issue or that the resolution of either in petitioner's favor could change the outcome of this case. Instead, as to both questions, the government argues only that the issue was correctly decided below, and that there is no split among the circuits. As to the second issue only, the government also contends that petitioner's case is a "poor vehicle" for resolution of the question, because it arises in a plain error context. None of the government's arguments affords a persuasive reason in this case to deny review.

### 1. A defendant's fundamental right under Article III and the Sixth Amendment to be tried in the state and district where the crime was committed is not protected by integrating it into trial through a jury determination in the contested venue.

a. The government repeatedly argues that the constitutional right to be tried only in the proper district is fully protected by "integrating it into the trial" through a determination by the jury of the propriety of its own venue. BIO 8, 11-13. The government advances its integration-into-trial argument

to distinguish the venue and vicinage rights from the rights guaranteed by the Double Jeopardy and Self-Incrimination Clauses and the Fourth Amendment, the preservation of which the government concedes may sometimes only be ensured through a pretrial hearing. BIO 10-12.

The sole authority offered by the government in support of its integration-into-trial theory is the equally conclusory opinion of the Eleventh Circuit below that "the Sixth Amendment right to have venue proven as an element of the offense is safeguarded by integrating it into the trial." Pet. App. 19-20. But the court below also failed to provide any authority or reasoning to support the proposition that the important right protected by Article III and the Sixth Amendment to be tried only by a jury selected in a constitutionally proper venue can somehow be vindicated through a determination by a jury drawn from the very locale challenged by the defendant.

It is not surprising that neither the Eleventh Circuit nor the government was able to offer support for this novel theory, since it is directly at odds with both the historical abuses of venue against which the Framers sought to protect and this Court's interpretation of the venue provisions of Article III and the Sixth Amendment. Indeed, it is telling that the government does not even attempt to address the Framers' and this Court's historical understanding of the venue and vicinage rights, discussed at length in the Petition. Pet. 14-18.

Surely the critical rights guaranteed by the Founders could not have been vindicated by transporting a colonist across the Atlantic and "integrating" his claim that he should only be tried in the colonies into a determination of the venue question by an unsympathetic English jury. The damage to our hypothetical colonist would be inflicted as soon as he embarked for England, with the resulting hardship and prejudice, and could not be undone by later presenting the propriety of trial abroad to the contested English jury. The Framers feared the same could be true if a citizen of Georgia were forced to stand trial in a federal court in Massachusetts, and they protected against that risk when defining the right to trial by jury. The very removal of the defendant from the locale of the alleged crime to be tried in a hostile and remote forum was prejudice enough in the eyes of the Framers. The policies protected by the right could not be fully vindicated even by an acquittal, much less by a conviction in the distant district, which would not represent a reliable and impartial judgment.

Even if the improperly empanelled jury acquits the defendant, his rights have not been "preserved"; at best, the violation has proven harmless in one important respect. But even then, just as the protections of the Double Jeopardy Clause are irreparably violated where they are not vindicated *before* a defendant is haled into court a second time, *see, e.g.*, *Abney v. United States*, 431 U.S. 651, 660-62 (1977), the right to be subjected to the judgment only by a

jury of the state and district wherein the crime was committed may be irrevocably harmed the moment a defendant is haled before an improperly empanelled jury, forced to leave his home and prepare for trial there, and subjected to a distant jury's unreliable venue determination.[1]

b. "[T]he inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice. . . ." *Ex parte Milligan*, 71 U.S. 2, 123 (1866). The right to trial by jury existed in England for hundreds of years before the United States Constitution was written. *Duncan v. Louisiana*, 391 U.S. 145, 152 (1968). The right to be tried according to a particular venue and vicinage was incorporated into the Constitution to safeguard against injustices by the Crown and Parliament known all too well to the Framers. The Declaration of

---

[1] The government claims that a determination of improper venue has no double jeopardy effect because it does not represent a determination of a factual element in the defendant's favor. BIO 11 n.2. But double jeopardy may apply even where there has been no factual determination at trial. *See Oregon v. Kennedy*, 456 U.S. 667, 675-76 (1982) (double jeopardy bars reprosecution where the government intentionally provokes defendant's successful motion for mistrial); *Illinois v. Somerville*, 410 U.S. 458, 461 (1973) (reprosecution barred following declaration of mistrial over defendant's objection, absent "manifest necessity" for mistrial); *Fong Foo v. United States*, 369 U.S. 141 (1962) (per curiam) (double jeopardy applies where trial judge directs jury to "acquit" and enters judgment of acquittal long before government rests its case, even though "egregiously erroneous").

Independence "stated solemn objections to the King's . . . 'depriving us in many cases, of the benefits of Trial by Jury, and to his transporting us beyond Seas to be tried for pretended offenses.'" *Id.* It was partly in response to those objections that the venue and vicinage provisions of Article III and the Sixth Amendment were enacted. *Id.* 152-53. The right "was considered so important to liberty of the individual that it appears in two parts of the Constitution." *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

An essential aspect at common law of trial by jury was the right to be tried in the venue and vicinage where the crime was committed. The First Continental Congress "unanimously resolved" that "the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." *Capital Traction Co. v. Hof*, 174 U.S. 1, 6 (1899) (quotation omitted). Justice Story wrote:

> By the common law, the trial of all crimes is required to be in the county, where they are committed. Nay, it originally carried its jealousy still farther, and required, that the jury itself should come from the vicinage of the place, where the crime was alleged to be committed. . . . It was doubtless by analogy to this rule of the common law, that all criminal trials are required to be in the state, where committed.

3 Joseph Story, *Commentaries on the Constitution of the United States* § 1775 (1833); *see also* 4 William Blackstone, *Commentaries on the Laws of England* 343 (1769).

These rights were viewed as being of such critical importance that the Jury Clause of the Sixth Amendment was added after "fears were expressed that Article III's provision failed to preserve the common-law right to be tried by a 'jury of the vicinage.'" *Williams v. Florida*, 399 U.S. 78, 93 (1970). The importance of the safeguard in Article III against the "unfairness and hardship to which trial in an environment alien to the accused exposes him" was thus "underscored" and "reinforced" by the provision of the Sixth Amendment requiring trial "by an impartial jury of the State and district wherein the crime shall have been committed." *United States v. Johnson*, 323 U.S. 273, 275-76 (1944); *see also United States v. Wood*, 299 U.S. 123, 142-43 (1936) ("The Sixth Amendment provided further assurances [beyond those provided by Section 2 of Article III]. . . . These [additional] requirements . . . are all of first importance.").

c. Consistent with those historical practices and purposes of the venue and vicinage rights, this Court for a century and a half has acknowledged, without fail, the important role played by those rights in preventing prosecutorial abuses and preserving the fundamental right of trial by jury. *See, e.g.*, *Gut v. Minnesota*, 76 U.S. 35, 37 (1869) ("Undoubtedly the provision [of the state constitution] securing to the

accused a public trial within the county or district in which the offence is committed is of the highest importance. It prevents the possibility of sending him for trial to a remote district, at a distance from friends, among strangers, and perhaps parties animated by prejudices of a personal or partisan character. . . ."). The Brief in Opposition in no way acknowledges the importance of the right at stake or its fundamental character.

d. The government also argues that defendants are not entitled to a pretrial determination of contested venue because no court has held that such a hearing is required. BIO 10. But this Court has not hesitated in recent Terms, even in the face of contrary precedent, to interpret the meanings of the enumerated guarantees of the Sixth Amendment in accordance with historical background and practices.

In *Crawford v. Washington*, 541 U.S. 36, 43-50 (2004), this Court exhaustively examined the historical background of the Sixth Amendment's Confrontation Clause to understand its meaning. Based on that historical analysis, the Court interpreted the Confrontation Clause based on the Sixth Amendment *as the Framers would have understood it and intended*. *Id.* 50-56. In doing so, the Court rejected a consistent, though recent revision of Sixth Amendment doctrine.

Similarly, in *Blakely v. Washington*, 542 U.S. 296, 305-06 (2004), interpreting the Sixth Amendment, this Court reaffirmed its commitment to *Apprendi v.*

*New Jersey*, 530 U.S. 466 (2000), as providing "intelligible content to the right of jury trial[,]" without which "the jury would not exercise the control that the Framers intended." Petitioner does not invoke those cases for their holdings (*compare* BIO 18), but rather for their spirit – that the Court should take up the present case to continue on the course of enforcing the Sixth Amendment according to the Founders' purposes. *Cf. Dimick v. Schiedt*, 293 U.S. 474, 476 (1935) ("In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791.").

Here, both historical understandings and this Court's own decisions regarding past abuses indicate that, where venue is contested on factual grounds before trial, full preservation of the Sixth Amendment and Article III venue and vicinage rights requires a pretrial evidentiary hearing.[2] The government's claim that no contemporary court has required such a hearing is not sufficient to overcome the great weight that has historically been accorded to these fundamental rights.

---

[2] Most questions about venue in criminal cases concern the determination of the correct legal rule. It is uncontroversial that such questions are decided by the court on pretrial motion. The issue presented here arises when the *rule* for determining venue is undisputed (*e.g.*, "legal residence," as defined in tax law), but the *facts* that would identify that place are in dispute.

e. The government implies there was no harm caused by depriving petitioner of his constitutional rights because it is "highly improbable" he would have prevailed during a pretrial venue hearing. BIO 13-14 n.3.[3] Petitioner does not agree that a defendant's constitutional right to trial in a proper venue can be nullified based on a one-sided prediction of failure, before even being given the opportunity to vindicate that right in an adversarial setting.

The factual record demonstrates that venue was vigorously disputed from the earliest stages of the case. The evidence proffered by the government as posing the greatest obstacle to petitioner's venue contention is a position he took, in challenging a New York Family Court's assertion of personal jurisdiction over him, in defense of interstate enforcement of an Indiana child support claim – an action later dismissed as wholly baseless. BIO 13 n.3, *citing* Gov't CA11 Br. 49 n.11. Unmentioned is that the prosecutorial pretrial motion on which footnote 11 of the government's appellate brief relied (D.Ct. Doc. 303) was dismissed as moot and therefore never adjudicated (*see* D.Ct. Doc. 332, at 8), and that in answering the government's motion the defense pointed out that the New York court, after a hearing, *rejected* the defendant's position and held him subject to personal jurisdiction

---

[3] The Brief in Opposition fails to address petitioner's argument that trial before a constitutionally incompetent jury is structural error, Pet. 26, which would render moot the government's prediction.

there. D.Ct. Doc. 308, at 2-3. Petitioner also noted that "[a]ll of his formal tax returns have always declared New York City as his legal domicile." *Id.* 2.

The government also proffers two magazine articles describing the house petitioner arranged to have constructed in Windermere, Florida. But those articles (which do not appear in the record, despite the government's reference to what "the record [does or] does not suggest," BIO 13 n.3), even if taken as admissible proof, are not the compelling evidence of petitioner's place of residence the government claims. Neither calls the Florida house "his home," as does the government's footnote. To the contrary, the articles revealed that petitioner had "spent just five weeks in Florida last year[,]" apparently referring to 1996, and "[t]hey were, quite literally, a retreat[,]" and that he "has entertained [friends] only once in Florida." *Architectual Digest*, Apr. 1997, at 216. Some nine months passed between when petitioner discussed the house with his designer and he next saw the house or the designer again, *Ebony*, Nov. 1997, at 195, and he "does not spend as much time as he would like in his Florida hideaway. . . ." *Id.* 198. The cover article in the same issue quotes Mr. Snipes as stating that "he lives a 'very simple, down-to-earth' lifestyle between homes in Los Angeles, New York and Florida." *Id.* 189-90. Nowhere is he quoted as saying, nor does either article as a whole imply, that the Windermere house was his principal or permanent abode.

Even more important, the government fails to acknowledge that the articles were written in 1997, several years before the dates (in 2000-2002) of the alleged willful failures-to-file for which petitioner was indicted. As such, they have little bearing on whether Florida was petitioner's "legal residence" for purposes of determining venue for each count.

At the time of the Founding, a determination of legal domicile was unlikely to change during an adult's lifetime. Modern Americans, by contrast, are mobile. The government's suggestion that the venue issue would not likely have been resolved in petitioner's favor had the requested pretrial evidentiary hearing been allowed is not only constitutionally immaterial, it is also wrong.

To address the important constitutional issue presented in this petition, a writ of certiorari should be granted.

**2. Petitioner's argument regarding the proper standard of proof was sufficiently preserved to permit this Court's review.**

The Brief in Opposition agrees with petitioner that every Circuit applies a preponderance standard for proof of venue, and does not deny that all of those cases lead back to a single Eighth Circuit precedent which fails utterly to support the lower courts' shared assumption. Pet. 29-31. Nor does it describe the issue as unimportant; it hardly could. Rather, the government contends this case would be a "poor vehicle" in

which to consider the proper standard of proof for venue determinations because "petitioner did not properly preserve his claim" and this Court's review would thus be limited to plain error. BIO 19.

a. The government does not deny that the burden issue was properly presented on appeal and addressed there. *See United States v. Jimenez Recio*, 537 U.S. 270 (2003) (sufficient preservation of appellate issue made futile by Circuit precedent).

b. The government also disregards several of petitioner's other contentions demonstrating sufficient preservation of this argument. Petitioner notes that, in the similar case of *United States v. Gaudin*, 515 U.S. 506 (1995), for example, this Court fully addressed the merits of a fundamental Sixth Amendment issue arising out of a jury instruction despite the issue's having arisen in a plain error posture because any objection lodged at trial would have fruitlessly challenged settled precedent. Pet. 34; *see also id.* n.28. Petitioner also argues, with detailed record support, that the difference in burdens of proof could not be deemed harmless, even if the error were not treated as structural on plain error review. *Id.* 35.

c. In fact, petitioner's case would be a "good vehicle" for addressing the proper standard of proof insofar as the factual record clearly demonstrates that venue was a hotly contested issue throughout the proceedings below. Even if the jury might have been justified in ruling for the government on a

preponderance standard, Pet. App. 20 n.7, a rational jury would necessarily have entertained at least a reasonable doubt about venue for the failure-to-file counts. This Court therefore need not conduct a fact-intensive review of the record to determine if the contested legal question is either ripe or harmless here.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectively submitted,

SAMUEL J. BUFFONE
BRIAN P. KELLY
BUCKLEYSANDLER LLP
1250 24th St., NW, Suite 700
Washington, DC 20037
(202) 349-7940
SBuffone@BuckleySandler.com

PETER GOLDBERGER
*Counsel of Record*
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net

*Of Counsel:*
DANIEL R. MEACHUM
DANIEL R. MEACHUM & ASSOC., LLC
Centennial Tower, Suite 2400
101 Marietta St., NW
Atlanta, GA 30303
(770) 988-9600
dmeachum@dmeachumlaw.com

*Attorneys for Petitioner*

May 17, 2011